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REPORTS

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FULL BENCH
R. C. No. 28 of 1940
November 25, 1940
SIR LIONEL LEACH, C. J. KRISHNASWAMI AYYANGAR & HAPPELL. JJ

In the matter of Sri R.K. ADVOCATE, Madura

Legal Practitioner—Letter to clerk in magistrate's office—Improper conduct.

It is improper for an advocate to address a letter to a clerk in a magistrate's office asking that an application filed by him should be dealt with urgently.

Case under s. 12 of the Indian Bar Council Act calling upon Sri R. K. Advocate, Madura, to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in respect of the complaint of the sub magistrate of Manapparai dated 16—3—1940 stating that with a sinister motive he wrote a letter, couched in somewhat unusually endearing terms to the magisterial clerk of the sub magistrate's Court, Manapparai, in regard to the despatch of certain refund orders from that court and that he was therefore guilty of grossly improper conduct in the discharge of his professional duty.

Advocate General (Sir A. Krishnaswami Iyyer) in support of the reference.
S. Krishnamoorthy, for the Advocate.

ORDER
(SIR LIONEL LEACH, C. J.)

The respondent is an advocate practising in the Madura district. He has been charged with professional misconduct in that he wrote a letter to a clerk of the sub magistrate of Manapparai in the Trichinopoly district asking in effect that the return of money, jewels and a wrist watch to his clients should be dealt with urgently They were entitled to the return of the money and the articles. In fact an application had been made to the district magistrate for an order directing their return and this order had been passed. The letter complained of is dated 18th May 1938 and is in these terms.

"My Dear Brother,

I pray that you will be blessed with welfare, riches and good luck. I have herewith enclosed a memo. Yesterday, I have sent a memo. You should immediately send the documents referred to in these two memos to the Treasury office at Kulitalai (for reference and return); further, I request you much to send me immediately the order directing the return of money to the petitioners. You must excuse me for the trouble. I feel very grateful for the help rendered by you till now and for the same to be rendered in future. I pray that God will bless you with long life and prosperity."

The sub magistrate opened the cover and it was in this way that the letter came to light. The enquiry into the respondent's conduct was conducted by the district judge of Trichinopoly and he has submitted a report in which he has expressed the opinion that the respondent has not been guilty of professional misconduct. The district judge has gone so far as to say that there was nothing improper on the part of the advocate in requesting the clerk to expedite the despatch of the refund order to enable his clients "to get a refund of the money which they were legitimately entitled to get."

It is manifest that it is improper for an advocate to address a letter to a clerk in a magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for the respondent was, if there was any delay, to bring the matter to the notice of the sub magistrate himself. If such letters were allowed there is no knowing to what it might lead. We will assume that the respondent did

not intend anything improper, but he must have realised that what he was doing was improper. He has apologised and therefore we consider that the case will be met by censuring him for his conduct. It must be clearly understood that in future a case of this nature will not be so leniently dealt with.

N.T.R.

Cr. R. C. No. 799 of 1940
Cr. R. P. No. 753 of 1940

November 18, 1940

BURN & MOCKETT, JJ.

THE PUBLIC PROSECUTOR
v.
S. VENKATASUBRAMANYAM

Children Act (Mad. Act IV of 1920), ss. 3 & 22—'Young person'—Material point of time to determine.

The point of time which is material in considering whether an offender is a young person as defined in the Children Act or not, is the time at which the sentence is to be pronounced and not the time of the commission of the offence.

The facts appear from the judgment of the lower court which was as follows:

"Accused is a Brahmin youth. His parents live near Madras and own 20 acres of land. He has four younger brothers and a younger sister. In August last year he was admitted as a student in the Sanskrit College at Tirupati, a college maintained by the Devasthanam Committee. He lodged with his widowed aunt Lakshmamma in Porla Street in Tirupati, to whom he paid nothing for board and lodging. On his own showing he was adequately provided with pocket money, for his parents sent him Rs. 5 or Rs. 10 every month and he himself was earning Rs. 7 a month as pujari in a temple three miles out of Tirupati. His true age presents an unexpected difficulty. The college admission register gives his date of birth as 10-6-1924, but unfortunately the figure '4' has been over-written and there is therefore a slight suspicion that this date has been altered after this offence in order to make it appear that he was under 16 years old at the time of the offence. No horoscope has been produced and no extract of the village register of births. Accordingly, I summoned the district medical officer who after examining him has deposed that in his opinion accused is now over 17 years old and under 18 years. That, after all is an opinion and by no means conclusive.

Accused made friends at Tirupati with one Raghavalu (P. W. 3) who had been a student for four years at the college and is 18 years of age. Raghavalu is a Dasari by caste. His people are beggars by profession. Raghavalu, unlike accused, had no pocket money. He lived free in the College hostel and tution is free. Accused used to give him books and clothes. They were in the same class and used to study together mostly at accused's house.

There was an old Brahmin widow of 70 years named Venkatasubbamma who lived alone in a house three doors away from accused in Porla Street. She was emaciated, weak and bent. One day (February 5th) she came to accused's house when he and his friend Raghavalu were reading on the pial. A goldsmith had brought a ring ordered by accused's aunt Lakshmamma, and Venkatasubbmma was admiring it and saying that she also would like to have one made like it. From this the women's conversation turned to the quality of the gold chains worn by Lakshmamma and Venkatasubbamma respectively. They took their gold chains off, handed them to the goldsmith and asked him to say which was the more valuable. He gave his verdict in favour of Venkatasubbamma's chain.

On the following day (February 6th) accused and his friend Raghavalu decided to murder Venkatasubbmma and to rob her of her jewels-a gold chain and two gold rings. February 7th, 8th and 9th were college holidays, and February 8th was fixed for the murder. In order that Raghavalu might see what the old woman's house was like inside, he called on her at 10 a.m. on the 8th ostensibly to borrow some clothes which she had promis-

ed to lend accused for draping the idols in his temple. Later that same afternoon (about 1 p. m.) accused and Raghavalu went to the old woman's house. They entered by the front door, which accused bolted behind them. The old woman was in her kitchen. She had cooked herself a meal of rice and dhall and was sitting beside her grinding stone and cleaning it so as to grind the dhall for her sauce. Accused told Raghavalu that he must kill her, and Raghavalu crept up behind her and seized her thin neck from behind and squeezed hard with both hands till she fell on her back—dead. Accused himself remained at the threshold of the kitchen while this was being done. Raghavalu then removed the gold chain from her neck and one of her rings, The other ring was tight and difficult to remove. He called accused into the kitchen and gave him the chain and one ring and told him to go quickly. Accused went out through the back door into the backyard, then climbed on to the flat roof of the house, using a niche in the backyard wall, and then down the step, which lead from the roof to the front verandah. Apparently the risk of speedy detection was less by this route than if they had opened the front door. Raghavalu stayed behind and after some trouble managed to remove the other ring, but it slipped from his fingers and fell among the dead woman's clothes and he could not find it. Panic seized him and he made his escape by the same way as accused, leaving the second ring behind.

Less than an hour later (2 p. m.) Rangamma (P. W. 6), whose husband is related to Venkatasubbamma, crossed the lane to ask the latter for some water (her house is opposite). She called out but there was no answer. The old woman's front door was bolted inside. She climbed the steps on the front verandah and went on to the flat roof and looked down the chimney skylight into the kitchen. She could just see the feet of Venkatasubbamma who was lying on the kitchen floor. As Venkatasubbamma had been complaining of fever, Rangamma thought she had fainted through not taking her food. She therefore called her son, who also went up on the roof and jumped into the backyard, entered the house by the back door which was open and opened the front door. Still thinking that the old woman had fainted they lifted her to carry her on to the verandah. As they did so a ring fell from her person, which Rangamma picked up. Having carried her to the front of the house they poured water into her mouth, but it came out again. They then saw that she was dead. By now many people had assembled. Some one looked at her neck, and it was discovered that her gold chain was missing and that her neck was severely bruised and scratched. It was then plain that she had been throttled to death and robbed. The Police were sent for.

About 20 days later Raghavalu asked accused for money. It was, thereupon agreed that accused should go to Madras and sell the the stolen gold chain and the ring which are worth about Rs. 400 and give half the proceeds to Raghavalu. Raghavalu saw accused off at the Tirupati Railway Station, and bought his ticket for him to Renigunta—the junction for Madras.

On 28—2—1940 a Sub Inspector of Police in the crime branch, Madras, was on investigation duty with a Head Constable and constable. They were all in plain clothes. The Sub-Inspector (P. W. 8) noticed accused going from one jeweller's shop to another in Mint Street and watched him. He followed accused to China Bazzar and saw him approach a jewel broker (P. W. 7) who was standing in the street and show him a valuable gold chain. As accused's movements had been suspicious the Sub-Inspector went up and asked accused his name and address and how he came by that valuable chain. Accused's answers were not satisfactory. He said it was his wife's chain, then that he had taken it without his wife's knowledge and finally that he had stolen it from his father-in-law. The Sub Inspector arrested him seized the gold chain, searched him and found a gold ring on his person. Accused had said that he was a student in

the Sanskrit College at Tirupati. Therefore on 3—3—1940 a constable was sent to the Police there with the jewels to make further enquires. They were soon discovered to be the jewels of the murdered woman.

Accused made a full confession of his part in the murder and implicated Raghvalu, who also made a full confession. Accused's confession was recorded by a Magistrate (P.W. 2) on 11—3—1940 and Raghavalu's on 15—3—1940. Neither of them has resiled from his confession. The confessions are detailed and the details given above are taken from them. Raghavalu was conditionally pardoned by the District Magistrate on 2—4—1940 and has given evidence as an approver (P. W. 3). As he has made no attempt to conceal his part or to withhold anything, I must now discharge him.

I agree with the assessors that the charge against accused has been fully made out not only by his own confession but by other evidence in the case. I convict him under section 302 read with section 114, Indian Penal Code. The sentence to be passed presents considerable difficulty. On the whole I am inclined to accept the statement in the college admission register that he was born on 10—6—1924 as correct. He gave his age as 16 years when his confession was recorded on 11—3—1940 and I do not believe that he can have realized so soon that his age was material. Moreover, the investigating Sub-Inspector of Police (P. W. 15) examined this admission register on 3—3—1940 though he did not initial it and though he did not examine it with a view to finding out accused's age. On the evidence before me I must find that accused was under 16 years on 8—2—1940 when this dreadful crime was committed. He was a 'young person' as defined in S. 3. of the Madras Children Act (IV of 1920). He cannot therefore be sentenced to death or transporation for life (vide section 22 of the Madras Children Act). He can be sent to a Senior Certified School but only for a short period—less then two years—for he will be 18 in June 1942 (vide section 24). I consider that it would be totally inadequate to pass a final order to that effect now. I have therefore decided to report this case for the orders of the Local Government under section 27 of the Madras Children Act. My recommendation is that he be kept in a Senior Certified School until he is 18 years old and that after considering his record at the school and the report of its Principal the question be considered in 1942 whether he should be further imprisoned or placed on probation or otherwise dealt with. Pending the orders of Government the accused will be committed for safe custody to the Senior Certified School at Chingleput. I may add that his father did not attend the trial but only his uncle. I am also informed by the investigating Sub Inspector (extra judicially) that accused has committed theft before this offence (of a silver plate on which he was given a meal) but on that occasion the stolen property was restored and there was unhappily no punishment. * * "

Petition under Ss. 435 & 439 Cr.P.C., 1898, praying the High Court to revise the order of the court of session of the Chittoor Division dated 17th July 1940 and passed in S. C. No. 14 of 1940.

Public Prosecutor (V. L. Ethiraj) in person.
C. K. Venkatanarasimham, for Respt.

JUDGMENT.
(BURN, J)

The learned Public Prosecutor has brought up in revision the order passed by the learned Sessions Judge of Chittoor in S. C. No. 14 of 1940. In that case the accused Venkatasubramanyam was charged with abetment of murder (Ss. 302 and 114 of the I. P. C.). The assessors unanimously expressed the opinion that he was guilty and the learned Sessions Judge found him guilty under Ss. 302 and 114 but the learned Judge, instead of passing any sentence upon the accused, has reported the case to Government for orders under S. 27 of the Madras Children Act (IV of 1920). Pending the orders of the Government the learned Judge has ordered the accused to be detained in the Senior Certified School at Chingleput.

The order of the learned Sessions Judge is based upon the fact that the accused

was under 16 years on the 8th of February, 1940, when this dreadful crime, as the learned Judge properly calls it, was committed. The learned Judge says that the accused was a 'young person' as defined in S. 3 of the Madras Children Act (IV of 1920) and therefore he cannot be sentenced to death or transporation for life—vide S. 22 of the same Act. The learned Judge has however failed to notice that the point of time that is material in considering whether an offender is a 'young person' or not is the time at which the sentence is to be pronounced. S. 22 says:

"Notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment......"

Now on the 17th of July 1940, when the learned Sessious Judge had concluded this trial and was in a position to pass sentence the accused in this case was no longer a 'young person'. The learned judge's finding is that the accused may be taken to have been born on the 10th of June 1924. The learned Judge has pointed out that there has been some alteration of the final figure in the Sanskrit College register, which he treated as evidence for purposes of the case, but even if the figure is properly recorded as 1924 it is clear that the accused was over 16 at the time of the trial of the case. He was not therefore a 'young person' and S. 22 did not impose any bar against sentencing him to death or transportation. This is made clear by a reference to the definition of 'youthful offender' in S. 3 of the Act. It is there stated that a 'youthful offender' means any person who has been convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of sixteen years. It is therefore the time of the conviction and not the time of the commission of the offence that is important.

The order of the learned Judge must therefore be set aside. In considering the sentence that ought to be passed in this case we are obliged to note that the crime was a peculiary despicable one. The person murdered was a very old and infirm lady and she was murdered for the sake of her valuable gold chain that she was wearing round her neck and a ring that she wore on her hand. She was murdered by strangutation, the actual strangling being done by one Raghavalu at the instigation of the accused, Venkatasubramanyam. Why Raghavalu was tendered a pardon and thereby enabled to get off scot-free we do not know. Learned counsel for the respondent in this case has pointed out the great disparity in fortune between Raghavalu and the respondent. Raghavalu who did the actual murder gets off wholly free. The respondent who conceived and instigated the murder but did not commit it is in danger of being hanged. That however by itself is not of course a reason for mitigating the punishment of this respondent. We have frequently stated that youth alone is not a reason for mitigating punishment in murder cases, but those cases have usually been cases of offenders above the age of 18. It is very rarely that young murderers under 18 are sentenced to death. We shall therefore sentence the respondent in this case to transportation for life. It is not a case in which we are able to make any recommendation on his behalf to the provincial Government.

N.T.R. — *Petition allowed*

Cr. R. C. No. 927 of 1939
Cr. R. P. No. 875 of 1939

August 2, 1940

LAKSHMANA RAO J.

RAYUDU BAPIAH

v.

PILLI JAKARAYYA & others.

Cr. P. C. (V of 1898*), s.* 250*—Case charged by police after investigation—No compensation to accused.*

Where the case was charged by the police after investigation an order under s. 250, *Cr. P. C. for compensation to the accused cannot be supported.*

The facts appear from the judgment of the lower court which was as follows :

"The first 3 accused are Malas and the 4th is a Telaga. They all belong to

Manduru. They stand charged by the Station House Officer, Tenali Taluk station, for an offence under s. 435 I. P. C.

There are two parties in the village of Manduru on account of the 'chindu dance'. Kammas and Madigas form one party and Telagas and Malas form the other party. On the night of 25—6—39 at about 10 P. M., P. Ws. 1 and 2 went to their fields to water the paddy seed-bed of P. W. 1. After watering the seed-bed they were sitting at a distance of 25 yards from a hay rick belonging to P. W. 1. Shortly afterwards, they noticed fire on the southern side of the rick. They ran towards the rick and noticed the four accused running away from the scene. P. Ws. 3 and 4 who were coming to the fields saw the 4 accused running from South to North. On noticing them the accused turned to West and entered the Malapalli. P. W. 1 complained to the village munsif next morning at 11 A. M., who submitted his reports to the police. The sub Inspector of Police after necessary investigation has charged the four accused for the above offence.

* * * *

I find from the evidence that the accusation against the accused is false and also vexatious.

* * * *

Under s. 250 Cr. P. C., I called upon the complainant to show cause why he should not be directed to pay compensation for having filed a false and vexatious complaint against the four accused. He merely states that his case is a true one. This is not satisfactory. For the reasons given above; I hold that this is a false and vexatious complaint and he should be made to pay compensation to the accused. The general impression is that in police cases where the complainant gives information to the village munsif, he is not liable to pay compensation under s. 250 Cr. P. C. This is not correct and the liability exists even when he gives information to the village munsif. I direct him to pay compensation at Rs. 10 to each of the accused, and in default, to suffer simple imprisonment for a period of 25 days each."

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the sub Divisional magistrate of Tenali in C. C. No. 38 of 1939.

S. Vepa, & J. Krishnamurti for Petr.
K. Krishnamurti, for Respts.
A. S. Sivakaminathan, for Crown.

ORDER.

The case was charged by the police after investigation and the order under S. 250, Cr. P. C. cannot be supported. It is therefore set aside and the compensation if levied will be refunded.

N.T.R. *Petition allowed*

—

Cr. R. C. No. 794 of 1940
Case Ref. No. 40 of 1940
October 31, 1940.
LAKSHMANA RAO, J.

EMPEROR
v.
SHAIK SILAR

Cr. P. C. (V of 1898), S. 9, Cl. 3—Investing subordinate judges with powers of assistant sessions judges — Whether fresh appointment by designation or by name is necessary in the case of successor.

The present sub judge of Masulipatam who succeeded to a previous sub judge who was appointed by the Government as an assistant sessions judge tried a case that was posted before his predecessor and that came on before him in the ordinary course and passed sentence upon the accused. A reference was made by the district judge that as the present subordinate judge has not yet been appointed as assistant sessions judge the conviction appeared to be without jurisdiction.

Held, *the reference must be accepted and the conviction set aside and the case re-tried according to law.*

FACTS: The following reference was made by the sessions judge in this matter:

"A sessions case (S. C. No. 26 of 40) already transferred during the time of the previous subordinate judge Sri N. Narasimham Pantulu, B. A., B. L., stood posted to 14—9—40 for trial. The present sub judge, Sri P. R. Iswariah B. A., B. L., assumed charge of his office on 28—8—40 (forenoon). He has not yet been appointed

by the Government as an assistant sessions court under G. O. No. 1485 Mis. Law (General) Department dated 27—3—29. He took up the said sessions case for trial on 14—9—40 and disposed of it, convicting the accused person.

As the present subordinate judge has not yet been appointed as assistant sessions judge of the Kistna division at Masulipatam, the convition appears to be one without jurisdiction and it has to be set aside."

On this reference it was brought to the notice of the High Court that the following notification was published in the Fort St. George Gazette on the 22nd March 1929.

"Under the provisions of S. 9 (3) of the Code of Criminal Procedure, 1898, the Governor-in-Council is pleased to appoint the subordinate judge, Masulipatam, as assistant sessions judge for the Kistna session division."

Case referred for the orders of the High Court, under S. 439, Cr. P. C., by the sessions judge of Kistna in his letter dated 18-9-1940.

Public Prosecutor (V. L. Ethiraj), for Crown
Accused not represented.

ORDER.

The immediate predecessors of the subordinate judge of Masulipatam were appointed assistant sessions judges by name and there is no subsequent order appointing the subordinate judge of Masulipatam by designation or name as assistant sessions judge. The reference is therefore accepted and the conviction of the accused is set aside He will be retried according to law.

N.T.R. — *Conviction set asite*

Cr. R. C. No. 478 of 1940
Cr. R. P. No. 456 of 1940
July 26, 1940
LAKSHMANA RAO, J.

Ponnuswami Reddiar & another
v.
Emperor.

Cr. P. C. (V of 1898), S. 421—Summary dismissal on the same day the appeal was presented—Order set aside.

Where an appeal was presented on 2—7—40 and it was disposed of on the same day in spite of the request of the advocate for time to obtain the necessary records,

Held, *that the order of the sub divisional magistrate must be set aside and the appeal remanded for disposal according to law.*

Facts: The case in the first court was closed on the 29th June and the sub magistrate delivered judgment the same day. 30th June and 1st July were public holidays. Copy application was put in on 2nd July. The pleader who was instructed to present the appeal before the sub divisional magistrate was not the pleader who conducted the case in the trial court. The learned sub divisional magistrate dismissed the appeal on the day it was presented under S. 421 without giving an opportunity to the petitioners being heard on the merits of the appeal. This revision was presented against the dismissal of the appeal by the sub divisional magistrate.

Petition under Ss. 438 and 439 Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the sub divisional 1st class magistrate, Ariyalur, dated 2-7-1940 in Cr. App. No. 26 of 1940 (C. C. No. 545 of 1940) on the file of the court of the stationary sub magistrate Perambalur.

A. V. Narayanaswami Ayyar, for Petr.
Public Prosecutor, (V.L. Ethiraj) for Crown.

ORDER

The appeal was presented on 2—7—1940 and it should not have been disposed of the same day in spite of the request of the advocate for time to obtain the necessary records. The order of the sub divisional magistrate is therefore set aside and the appeal is remanded to the sub divisional magistrate of Musiri for disposal according to law.

N.T.R — *Petition allowed.*

Cr. R. C. No. 257 of 1940
Cr. R. P. No. 246 of 1940
October 29, 1940
LAKSHMANA RAO, J.

Thoonga Vadan alias Chinnama Naickan & others.
v.
Perumal Goundan & others.

Cr. P. C. (V of 1898), S. 148—Award of costs by subsequent order not legal.

Where there was no order as to costs in the decision under S. 147 Cr. P. C., and the costs were awarded by a subsequent order the order cannot be sustained.

Facts: A petition was filed under S. 147 Cr. P. C. for removing the dam which the counter-petitioners are said to have put on the weir of a tank causing obstruction to the free flow of water to the petitioner's lands. A preliminary order under S. 147 was served on both the parties. The lower court concluded, "I find it expedient to take action under S. 147, Cr. P. C., against the counter-petitioners. I therefore order that the counter petitioners shall not retain the bund referred to above or any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the petitioners." This order was passed on 25—2—1940. On 20—3—1940 the lower court passed an order awarding costs to the petitioners. A revision was filed in the High Court on the ground that the lower court erred in passing an order for costs long after the order made under S. 147 Cr. P. C.

Petition under Ss. 435 and 439 of Cr. P. C. 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Namakkal dated 20—3—1940 and passed in M. C. No. 56 of 1939.

V. T. Rangaswami Ayyangar & T. R. Ramachandran, for Petrs.

K. S. Jayarama Ayyar & S. Arunachalam, for Respdt.

A. S. Sivakaminathan. for Crown.

ORDER.

There was no order as to costs in the decision under S. 147 of the Cr. P. C. and the award of costs by a subsequent order cannot be supported. The Revision Petition is therefore allowed and the order as to costs is set aside.

N.T.R. — *Petition allowed.*

CR. APP. No. 716 OF 1940

December 3, 1940

LAKSHMANA RAO, J.

The PUBLIC PROSECUTOR

v.

Kanholi KUNHIRAMAN NAYAR

Post Office Act (VI of 1898), Ss. 72, 52 & 53—Offences under Ss. 52 & 53—Cognisance of.

The offence under S. 53, Post Office Act can be taken cognisance of without any complaint. The fact that the acts also constitute the minor offence under S. 53 is no bar to the trial of the offence under S. 52.

Appeal under S. 417 of the Code of Criminal Procedure, 1898 against the acquittal of the aforesaid respondent (accused) by the assistant sessions judge of Ottappalam of the Court of session, South Malabar Division in S. C. No. 44 of 1940 on his file.

N. Somasundaram for Applt.

K. S. Sundaram for Respt.

JUDGMENT.

The respondent a postman was charged by the police with an offence under S. 52 of the Indian Post Office Act for secreting two postal articles in course of transmission by post and he was committed for trial by the court of session of that offence There was no complaint by order of or authority from the Director-General or Postmaster-General and a preliminary objection was taken to the trial on the ground that the acts also constitute the minor offence under S. 53 of the Indian Post Office Act of detaining the postal articles, which accordining to S. 72 of the Indian Post Office Act cannot be taken cognizance of unless upon complaint made by order of or authority from the Director-General or Postmaster-General. The objection was upheld and the respondent was acquitted.

Hence this appeal by the Provincial Government that the order of acquittal cannot be supported. The offence under S. 52 of the Indian Post Office Act can be taken cognizance of without any complaint and the commitment was legal. That the acts also constitute the minor offence under S. 53 of the Indian Post Office Act is no bar to the trial of the offence under S. 52 of the Indian Post Office Act and the respondent ought to have been tried for that offence. The order of acquittal is therefore set aside and the respondent will be tried in accordance with law.

N.T.R. *Appeal allowed.*

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R. T. No. 166 of 1940
Cr. Apps. Nos. 660, 661 & 659 of 1940

December 3, 1940

BURN & MOCKETT, JJ.

EMPEROR
v.
Muddamsetti SUBBARAO & others

Penal Code (XLV of 1860), ss. 148 & 149 — Applicability.

Eight accused were tried jointly on charges arising out of offences committed in a disturbance, in the course of which one N. V. was fatally wounded, another V. was seriously injured and two others were also injured. The first three accused were armed with spears and the other five with sticks. V's chest was pierced by the first accused so that his lung was protruding in one place. It appeared the accused had assembled with a store of weapons close by including the spears and on meeting the other party ran to that place and came back armed. On these facts the Sessions Judge framed charges against all the accused under s. 148, I. P. C. read with s. 149. He separately charged the second and third accused with the murder of N. V. The first accused was separately charged with voluntarily causing grievous hurt with a deadly weapon to V. and accused 2, 3, 5, 6, 7 and 8 were charged with causing simple hurt.

Held, (1) *a charge under ss. 148 and 149, I. P. C. against all the accused was not proper but that the charge should have been under s. 147 against accused 4 to 8 and under s. 148 against accused 1 to 3 only.*

S. 148, I. P. C. differs from s. 147 precisely in the same way that s. 144 differs from s. 143. It is incorrect to say that s. 148 describes a separate offence. The only offence that s. 148 describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon.

S. 149 is intended to lay upon all the members of an unlawful assembly responsibility for any offence, other than the offence of rioting committed by any member of the unlawful assembly in prosecution of that common object. S 149 is not intended to make rioters constructively guilty of the offence of rioting,

59 *M. L. J.* 559 dissented from.

(ii) that the first accused should have been charged for an offence under s. 307 and not s. 326 in respect of the injury caused to V., and

(iii) that it would have been appropriate to charge all the accused except the 2nd and 3rd with liability for the murder of N. V. under s. 148 I. P. C.

FACTS: The charges framed against the accused in the sessions court ran as follows:

"I.......Sessions Judge Kistna Division, hereby charge you (1) Gaddam Raghavulu, (2) Muddamsetti Subba Rao, (3) Bhatraju Gopi, (4) Uddandu Satyanarayana, (5) Thota Basavayya, (6) Akkipalli Kutumba Rao, (7) Akkipalli Suryanarayana and (8) Vemereddi Ramudu, all of Bandar as follows:

Firstly: That all of you at about 9 p.m. on the 19th day of February 1940 at the Javarpet Junction, Bandar, formed yourselves into an unlawful assembly with the common object of causing bodily harm to Narkadamalli Vengataswami and the other members of his party, and that in prosecution of the common object of such unlawful assembly you committed rioting by causing the death of the said N. V. and voluntarily causing hurt to others, and that some of you were armed with deadly weapons, to wit, accused 1, 2, and 3 with spears and the others, i. e., accused 4, 5, 6, 7 and 8 with sticks during the said rioting in prosecution of the common object of the said unlawful assembly and thereby all of you committed the offence of rioting armed with deadly weapons, punishable under Ss. 148 and 149 I. P. C., and within my cognisance.

Secondly. That the accused 2 and 3 amongst you, at the said time and place and in the course of the same transaction described in Charge No. 1 caused the death of N. V. either by intentionally causing his death, or by intentionally causing to him

such bodily injuries as you knew to be likely to cause his death, or by intentionally causing to him such bodily injuries as were sufficient in the ordinary course of nature to cause his death, and thereby committed the offence of murder, punishable under S. 302, I. P. C., read with S. 34, I.P.C., and within my cognisance.

Thirdly: That the accused 1 amongst you at the said time and place, and in the course of the same transaction mentioned in charge No. 1, voluntarily caused grievous hurt with a dangerous weapon, to wit, a spear, to T. V. by spearing him on his back, and thereby committed the offence of voluntarily causing grievous hurt by a dangerous weapon, punishable under s. 326, I. P. C., and within my cognisance.

Fourthly: That the accused 3 amongst you, at the said time and place in the course of the same transaction mentioned in charge No. 1, voluntarily caused hurt to police constable No. 557, N. Anthony a public servant, to deter him from his duty and thereby committed the offence of voluntarily causing hurt to deter a public servant from, his duty, punishable under S. 332 I. P. C. and within my cognisance.

Fifthly: That the accused 5, 6, 7 and 8 amongst you, at the said time and place and in the course of the same transaction mentioned in charge No. 1, voluntarily caused hurt to P. Chandramouli by beating him with sticks on different portions of his body and thereby committed the offence of voluntarily causing hurt punishable under S. 323, I. P. C., and within my cognisance.

Sixthly: That the accused 2 and 3 amongst you, at the said time and place, and in the course of the same transaction mentioned in charge No. 1, voluntarily caused hurt with a dangerous weapon, to wit, a spear, to T. V. by spearing him on his chest and forehead, and that the third accused amongst you voluntarily caused hurt with a dangerous weapon, to wit, a spear, to P. Chandramouli by spearing him on his right foot and thereby committed the offence of voluntarily causing hurt by a dangerous weapon, punishable under s. 324 I. P. C. and within my cognisance."

The Sessions Judge convicted the accused as follows:

"(1) All the accused Nos. 1 to 8 are convicted under s. 148, I. P. C. read with s. 149, I.P.C. for rioting armed with deadly weapons, and are sentenced each to undergo rigorous imprisonment for a period of two years.

(2) The accused Nos. 2 and 3 are convicted under s. 302, I. P. C. read with s. 34, I. P. C. for the murder of N. V. and are sentenced to be hanged by the neck until they be dead. This sentence shall be subject to confirmation by the High Court, and these accused are informed that, if they wish to appeal, they should prefer their appeal to the High Court within seven days from this date.

(3) The 1st accused is convicted under s. 326, I.P.C. for having caused grievous hurt to T. V. with a deadly weapon, and is sentenced to undergo rigorous imprisonment for a period of five years.

(4) The 3rd accused is convicted under s. 332, I. P. C. for having caused hurt to the P. C. No. 557, Anthony, a public servant, while in the discharge of his duty, and is sentenced to undergo rigorous imprisonment for a period of two years.

(5) The accused Nos. 5, 6, 7 and 8 are convicted under s. 323, I. P. C. for having caused hurt to Chandramouli and are sentenced each to undergo rigorous imprisonment for six months.

(6) The accused Nos. 2 and 3 are also convicted under s. 324, I. P. C., the accused Nos. 2 and 3 for having caused hurt with deadly weapons to V, and the 3rd accused for having caused hurt to Chandramouli with deadly weapons, and they are sentenced each to undergo rigorous imprisonment for two years.

(7) The sentences shall run concurrently."

Trial referred by the Court of Session of the Kistna division for the confirmation of the sentences of death passed upon the said prisoners on 6th September 1940 in C. C. No. 19 of 1940 and appeals by the said prisoners (2nd and 3rd accused) against the said sentence of death and the sentences of imprisonment

passed upon them in the said case and appeals by the said accused Nos. 1 and 4 to 8 against the sentences of imprisonment passed upon them in the said case.

K. S. Jayarama Iyer & P. Suryanarayana, for Applts. . .

Public Prosecutor (V. L. Ethiraj) for Crown.

JUDGMENT

(Burn, J)

These eight appellants were tried jointly by the learned sessions judge of Kistna on charges arising out of offences committed at about 9 P. M. on the 19th of February last in Masulipatam town at a place called Javarpet junction. There was a disturbance at that place and time in the course of which one N. Venkataswami was fatally wounded, another man named Viraswami (P. W. 7) was very seriously injured, a police constable named Antony (P. W. 4) was slightly injured and one Chandramouli (P. W. 8) was severely wounded in the foot. The first three accused were alleged to have been armed with spears and the other five with sticks. On these facts the learned sessions judge framed charges against all the accused under S. 148 read with S. 149 I. P. C.; he separately charged the second and the third accused with the murder of Venkataswami. The first accused was separately charged with voluntarily causing grievous hurt with a deadly weapon to Viraswami, and the third accused was charged with voluntarily causing hurt to deter a public servant from his duty—S. 332 I. P. C. Accused 5, 6, 7 and 8 were charged with causing simple hurt to Chandramouli (P. W. 8) and accused 2 and 3 were charged with causing simple hurt with a dangerous weapon to Viraswami (P. W. 7). The learned sessions judge, disagreeing with the assessors (who perversely said that none of the accused was guilty of anything), held that all the accused were guilty of all the offences with which they had been charged. He sentenced the second and the third accused to death for the murder of Venkataswamy, the first accused to five years rigorous imprisonment for the offence under s. 326, all the accused to two years rigorous imprisonment for rioting armed with deadly weapons, the third accused to two years rigorous imprisonment for an offence under s. 332, the second and the third accused to two years rigorous imprisonment for an offence under s. 324, and accused 5, 6, 7 and 8 to rigorous imprisonment for six months for the offence of simple hurt. Hence these appeals.

Mr. Jayarama Iyer who has appeared for the appellants has conceded that there is no possibility of doubting the occurrence or the commission of the various offences with which the accused were charged. Accused 1, 3, 4 and 8 admitted their presence at the scene of offence and at the time stated by the prosecution witnesses. Accused 2 and 7 pleaded *alibi*, and accused 5 and 6 merely denied that they knew anything about the occurrence, and said they had been impleaded on account of enmity. Accused 2 and 7 adduced evidence in support of their pleas of *alibi*. The 7th accused examined three witnesses, D. Ws. 3, 4 and 7, to prove that he was at Godugupet, another part of Masulipatam. The learned counsel for the appellants has stated frankly that he is not able to ask us to rely upon the evidence given by these three defence witnesses. The second accused examined D. Ws. 5 and 6, and the evidence of these two witnesses is on the face of it rather more respectable than that given by D. Ws. 3, 4 and 7. But the great defect in this plea of *alibi* put up by the second accused is that when he wss examined in the sub magistrate's court, he did not mention it. The second accused was arrested very soon after the occurence and there was no suggession put to the police that, as soon as he was arrested, he expressed any astonishment or alleged himself to have been elsewhere. We think it is inconceivable that, if this plea had been a true plea, he could have failed to mention it when questioned by the magistrate.

It is not possible to doubt the truth of the story told by the prosecution witness in its main lines nor is it possible to doubt the presence and the participation

in the rioting of all these accused persons. Mr. Jayarama Aiyar's arguments have been chiefly directed towards showing that it would be unsafe to convict the second and the third accused for the murder of Venkataswami. He has examined the evidence given by all the witnesses of the occurence with great care and has attempted to persuade us that, although in the main they are witnesses of truth, yet in the circumstances they could not have been expected to observe with accuracy which of the rioters inflicted the fatal blow on Venkataswami. This is practically the only point seriously urged in these appeals.

There are no less than six eye witnesses in this case—P. Ws. 2, 3, 4, 5, 7 and 8. Of these, P. W. 4 is a police constable and P. W. 5 is a Head constable. The other four are men who admittedly belong to a faction opposed to the faction said to be led by the first accused in this case. The prosecution theory in fact is that these offences were committed as a result of hatred arising out of faction. In August 1939 Kodhandaramayya, P. W. 2's younger brother, who was at that time the leader of his party, was murdered. Accused 1, 6 and 7 in this case were charged along with others for the murder of Kodhandaramayya and they had been acquitted only three weeks before this occurrence, namely, on the 27th of January 1940. The prosecution witnesses say that Venkataswami, the deceased, had worked for the prosecution in that case. The eye witnesses all tell practically the same story of the occurrence on the 19th of February. They say that, when P. W. s. 2, 3, 7 and 8 arrived at the Javerpet junction and met the party of the accused, there was, to begin with, an exchange of words. Venkatawami is alleged to have told the police that it was the third accused who was really the source of all the trouble. To this the third accused is said to have replied with a threat, and the first accused is said to have instigated the others to action by enquiring why they were looking on without stabbing. As an indication that the accused had come there prepared to do violence, it is stated by these witnesses that the accused immediately ran to a disused well about 10 yards away and came back from there armed,—the first three accused with spears, and the other five with sticks. Then, according to all the witnesses, the second accused stabbed Viraswami (P. W. 7) in the chest. The third accused stabbed Viraswami on the head. Chandramouli was stabbed by the third accused and was afterwards beaten by the accused who were armed with sticks. The 4th accused threw sodawater bottles down on the road setting up a kind of barrage to prevent interference. The second and third accused stabbed Venkataswami with their spears and the third accused beat the police constable (P. W. 4) with his spear reversed.

Venkataswami was very seriously injured and he died by the time he reached the hospital. Viraswami was taken to the hospital and made a dying declaration to the sub magistrate (Ex. B). In that Viraswami alleged that he had been stabbed by seven persons, the names being the same as the names of accused 1 to 7 in this case. He said that Raghavalu, Subba Rao and Gopi were armed with swords and he said that all the seven persons who attacked him were armed with spears and swords. Mr. Jayarama Ayyar has pointed out that in this dying declaration Viraswamy has not alleged against the second and the third accused that they had inflicted the fatal injuries on him, and that he has not really attempted to discrminate between the persons whom he has mentioned. The two police officers, P. Ws. 4 and 5, the learned counsel agrees, are not interested witnesses in the sense that they have any motive to favour one side rather than the other in this case. Both the police officers alleged, as the other four partisan witnesses alleged, that it was the second and the third accused who stabbed Venkataswami but the evidence shows that the constable P. W. 4 ran after the third accused who had struck him with the shaft of his spear. The headconstable (P. W. 5) was seen by the sub inspector, (P. W. 6) chasing the first accused away from the scene,

and there seems to be no doubt, that while P. W. 5 was chasing the first accused, Venkataswami was actually being stabbed. Learned counsel urges therefore that these two witnesses, who otherwise might be considered to be reliable witnesses, cannot be trusted when they say that they saw the second and the third accused cause the death of Venkataswami. This suggestion is supported by reference to the evidence of the other witnesses. P. W. 2, for instance, says that the headconstable Venkatratnam (P. W. 5) went away chasing the first accused after the first accused had delivered the stab and was running away, and he says also that the first accused had run away by the time the third accused and Viraswami were grappling each other. P. W. 3 says that the first accused pushed by the head constable was going away along the road before Venkataswami was attacked by the third or the second accused. Learned counsel has also drawn our attention to the fact that the inspector of police (P W. 17), when he prepared the first information report at about 1-30 A. M., did not know which of the accused had inflicted the fatal wounds on Venkataswami. These are indications, we are asked to say, that at first the prosecution witnesses really did not know who had caused the fatal injuries and that they allotted the various parts to the various accused at a later stage. The learned Public Prosecutor on the other hand has argued that all the witnesses were examined very soon after the occurrence. P. Ws. 4, 5, 7 and 8 were examined before 6 O'clock the next morning, P. W. 2 at the inquest the next forenoon and P. W. 3 shortly afterwards. He has also drawn our attention to the fact that the sub inspector of Robertsonpet Police station (P. W. 6) deposed that P. Ws. 4 and 5 had told him about the occurrence by midnight. He was not cross examined in order to show that P. Ws. 4 and 5 had then omitted to mention to him the second and the third accused as the persons who had inflicted the fatal wounds on Venkataswami. The learned Public Prosecutor has also drawn our attention to the fact that, it was the 1st, 6th and 8th accused who were the principal members of their party, having been acquitted shortly before on the charge of murdering P. W. 2's brother. The first accused is alleged to be the leader of their faction and the learned Public Prosecutor asks why, if the prosecution witnesses were merely allotting parts without reference to realities, the second accused who is a mere jutka driver and the third accused who was the brother-in law of the first accused should have been chosen for the principal roles. We think there is considerable force in this contention, and that, if the prosecution witnesses had really been ignorant and had allotted the parts out of enmity, they would have been sure to give a leading part to the first accused. It is not possible, we think, to reject the evidence of the eye witnesses, who certainly had opportunities of seeing who stabbed Venkataswami and no discernable motive for saying that the second and the third accused were responsible for his death if in fact his death had been caused by others. We must therefore agree with the learned sessions judge that the second and the third accused were proved to be guilty of the murder of Venkataswami and we confirm their conviction for murder and the sentence of death which the learned sessions judge has imposed on them.

The learned sessions judge has not explained why he framed a charge under Ss. 148 and 149 against all these eight accused; nor has he explained in his judgment, why he thinks S. 149 has any application. The evidence is clear that the first three accused were armed with spears and the other five with sticks. There is no evidence of any witness to show that the sticks in this case were dangerous weapons. The charge framed should therefore have been under S. 147 against accused 4, 5, 6, 7 and 8 and under S 148 against accused 1, 2 and 3 only, and the accused should have been convicted accordingly. It is just possible that the learned sessions judge was guided by the decision in the

case of *Subbigadu* [1]. It is there stated that if some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly weapons may be convicted under S 148 read with S. 149. With respect, we think that this decision is of doubtful authority. S. 148 appears to differ from S. 147 precisely in the same way that S. 144 differs from S. 143. Under S. 143 any member of an unlawful assembly is liable to punishment up to six months. Under S 144 'whoever being armed with a deadly weapon......is a member of an unlawful assembly is liable to imprisonment for two years.' In exactly the same way, under S. 147, whoever is guilty of rioting is liable to imprisonment up to two years; and under S. 148 whoever being armed with a deadly weapon is guilty of rioting is liable to imprisonment for three years. The same distinction appears in the sections of the I. P. C, dealing with robbery. S. 392 provides a punishment for robbery and S. 397 provides an enhanced punishment, in the shape of a minimum sentence, for any robber who at the time of committing robbery or dacoity uses a deadly weapon, and similarly S. 398 provides some punishment for the robber or dacoit who is armed with a deadly weapon. We think that it is clear, as held by the Calcutta High Court in the case of *Sabir* v. *Queen Empress* [2], that it is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 398. In the case of the robbery sections there is ample authority for the view that we are taking — *Emperor* v. *Nageshwar* [3], *Emperor* v. *Dulli* [4], *Emperor* v. *Ali Mirza* [5], and in our own Court *Arunachala Thevan* v. *Emperor* [6] We think with respect, that in *Subbigadu's case* [1] it is incorrect to say that S. 148 describes a separate offence. The only offence that S. 148 describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. S. 149, we think, is intended to lay upon all the members of an unlawful assembly responsibility for any offences, other than the offence of rioting, committed by any member of the unlawful assembly in prosecution of the common object. S. 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting. If the matter had been of any importance in this case we should have felt it necessary to refer to a Full Bench the question whether the case of *Subbigadu* [1] has been correctly decided. But in this case it is not necessary since the punishment for an offence under S. 147 is two years rigorous imprisonment. In modification of the judgment of the learned sessions judge we alter the conviction under the first charge to a conviction under S. 148 for accused 1, 2 and 3 and S. 147 for accused 4, 5, 6, 7 and 8.

Viraswami, as we have already said, was very severely hurt. His chest was pierced so that his lung was protruding in one place It is clear that he had a narrow escape with his life. Why the learned sessions judge did not charge the first accused with attempt to murder on the third charge we do not know. It would have been much more appropriate than a charge under S. 326. If Viraswami had no bones broken, the only kind of grievous hurt with which he can be charged in respect of Viraswami was that which is involved in putting Viraswami's life in danger. If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. The first accused may therefore consider himself fortunate in that he was not charged and convicted of an offence under S. 307. The remaining convictions are justified by the evidence and the sentences call for no interference.

The learned Public Prosecutor has

1. [1926] 50 M. L. J. 559
2. [1895] 22 Cal. 276
3. [1906] 28 All. 404
4. [1925] 47 All. 59
5. [1924] 51 Cal. 265
6. [1912] M.W.N. 35

brought to our notice that in this case the accused appear to have assembled with a store of weapons closeby including three spears. It would have been appropriate to charge all the other accused except the second and the third accused with liability for the murder of Venkataswami under S. 149 I.P.C. Considering the antecedents of the factions in Masulipatam it would have been difficult for any of the accused to show that he did not expect murder to be done. There is however no petition by the Provincial Government and therefore it is not necessary to say more on this subject.

The result therefore is that the appeals of all the accused are dismissed, the only modification being in the matter of the convictions on the first charge.

N.T.R. — *Appeal dismissed*

Cr. App. No. 760 of 1940
January 21, 1941
HORWILL, J.

THE CROWN PROSECUTOR
v.
GOPAL alias Malayalathan*

Evidence Act (I of 1872), S. 45—Expert evidence —Duty of court in assessing.

The Court is not bound to accept the evidence of an expert even though there are no special reasons for not accepting it. The magistrate must get the expert to explain in court the reasons for his opinion, as it is only after hearing those reasons in detail that the magistrate would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory. The magistrate is bound, unless he was himself satisfied that the expert evidence was correct to acquit the accused, where that is the only evidence against him.

Appeal under S 417, Cr. P. C., 1898, against the acquittal of the aforesaid respondent (accused) by the special Honarary Presidency Magistrate, George Town, Madras, in C. C. No. 2541 of 1940 on the file of the Court of the Presidency Magistrate, George Town, Madras.

Crown Prosecutor, (P. Govinda Menon) in person.

N. T. Raghunathan, for Accused.

JUDGMENT.

The house of P. W. 4 was broken into and in the process some panes of glass were broken. The only clue that the investigating officer was able to obtain was that on the broken panes of glass there were some impressions of fingers. These were photographed and magnified and sent to the Finger Print Bureau. The accused was arrested on suspicion and the impression of all his fingers were taken. They were compared by an expert of the bureau (P. W. 1) who has given evidence to the effect that the impressions found on the glass were those of two of the fingers, namely, the left index finger and the left ring finger of the accused. The Special Honorary Presidency Magistrate declared himself not satisfied by this evidence and gave the accueed the benefit of the doubt. The Crown has appealed against this acquittal.

The court is not bound to accept the evidence of an expert, even though there are no special reasons for not accepting it; and it was certainly proper on the part of the magistrate to satisfy himself by personal examination that the impressions of the accused and of those on the broken glass were identical. Even though he did not feel himself to be expert, yet he was bound, unless he was himself satisfied that the expert's evidence was correct, to acquit the accused. As the learned magistrate did compare the impressions, I do not think this court should set aside the acquittal merely because the learned magistrate might have adopted a sounder procedure.

One of the impressions found on the glass was a fairly good one, but the other was somewhat blurred; and it was probably difficult for the learned magistrate to compare all the points made by the expert merely with the aid of the notes. What he should have done was to have asked the expert in Court to elucidate his notes and to point out in the two impressions the points of identity which he had found. The expert filed his notes with his evidence and he has pointed out no less than 11 points of identity with regard to one impression and 10 points with regard to the other. If these points of identity

*1941 M.W.N. 218

really do exist, then there can be no doubt that the expert satisfactorily proved that the impressions on the glass were those of the accused. Unfortunately, the expert had no opportunity of explaining to the magistrate The magistrate let him leave the box without questioning him with regard to any single point of his evidence. Although I am not interfering with the order of acquittal, I would like to express a hope that the learned magistrate, if he has to deal with the evidence of an expert witness in future, he will take the pains to have the expert explain in court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory.

The appeal is dismissed.

N.T.R. *Appeal dismissed.*

C. R. P. No. 1939 of 1940

December 18, 1940

WADSWORTH, J.

PAPELLUGARI VEERA REDDY and others, In re*

Cr. P. C. (V of 1898*) ss.* 195 (1) *(b) &* 476 — *Complaint against persons not parties.*

In cases falling under S. 195 (1) *(b), Cr. P. C. the accused need not be a party, so that a complaint under S.* 476, *Cr. P. C. can be laid against persons not parties to any suit.*

42 *Mad.* 540 *relates to cases falling under S.* 195 (1) *(c) and has nothing to do with cases falling under S.* 195 (1) *(b).*

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Cuddapah dated 6—11—1940 and made in C. M. As, 23, 28 and 29 of 1940 against the proceedings under S. 476 of the Code of Criminal Procedure dated 22—7—1940 of the Court of the District Munsif of Cuddapah in O. S. No. 175 of 1938.

A. Narasimha Iyer, for Petrs
Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT.

The basis of this revision petition is the assertion that the petitioners are not parties to any suit and that they cannot therefore be prosecuted by means of a complaint under S. 476, Cr. P. C. The petitioners rely on the Full Bench ruling in *Govinda Iyer* v. *Rex* [1], which has a rather misleading head note. The decision really related to a case falling under S. 195 (1) (c) Criminal Procedure Code, and had nothing to do with cases falling under S. 195 (1) (b), in which the accused need not be a party. Here one of the offences alleged is an offence under S. 193, I. P. C. in connection with a proceeding before the District Munsif. Such an offence clearly falls under S. 195 (1) (b) Cr. P. C. and a complaint under S. 476 Cr. P. C. was necessary. The fact that the District Munsif has also complained that the facts establish offences under other sections to which S. 476 Cr. P. C. has no application, is not a ground for cancelling the complaint which was valid and necessary so far as the offence under S. 193, I. P. C. was concerned. Certainly it would have been better had the District Munsif filed a separate complaint, in his executive capacity of the offences of theft, etc., instead of including them in his complaint under S. 476, Cr. P. C. But the accused have not been damnified more especially as there is a police charge sheet in respect of those offences upon which the prosecution can be based. I decline to interfere in revision and dismiss this petition with costs of the Public Prosecutor.

N.T.R. *Petition dismissed.*

* 1941 M.W.N. 220 (1)

1. [1919] M W.N. 459; 42 Mad. 540 F. B.

Cr. App. No. 654 of 1940

December 17, 1940

LAKSHMANA RAO, J.

MARANA GOUNDAN v. EMPEROR*

Penal Code (XLV of 1860*), S.* 304 (2) — *Kicking on abdomen — Death — Offence.*

Where the accused kicked the deceased twice on the abdomen and death was due to shock due to the kicking and there was no mark of injury, external or internal,

* 1941 M.W.N. 220 (2)

Held, *it is difficult to hold that the accused intended or knew that the kicking on the deceased, as he did, was likely to endanger life and that a conviction under S. 304 (2) was unsustainable and should be altered into one under S. 323, I. P. C.*

Appeal against the order of the Additional Sessions Judge, Court of Session of the Coimbatore Division in C C. No. 100 of 1940,

Accused not represented.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT.

The appellant has been convicted under S. 304 (2) of the I. P. C. for causing the death of one Karuppa Chuckli by kicking him on the abdomen and sentenced him to rigorous imprisonment for 7 years.

The deceased owed one anna to the appellant and the latter demanded repayment. The deceased promised to pay later and the appellant is stated to have kicked him twice on the abdomen remarking "How long am I to wait". The deceased collapsed and died soon after.

The cause of death was shock due to the kicking and P. W. 7 a disinterested witness, not to mention P. W. 4 the widow, speak to the alleged kicking. P. W. 5 was informed about it soon after and the story of the appellant that he merely pushed the deceased and went away is incredible. But there was no mark of injury, external or internal, and it is difficult to hold that the appellant intended or knew that by kicking on the abdomen as he did, he was likely to endanger life. The conviction under S 304 (2) I. P. C. is therefore unsustainable and as rightly conceded the conviction can only be under S. 323, I. P. C. The conviction of the appellant is therefore altered to one under S. 323 I P C. and he is sentenced to rigorous imprisonment for one year.

N.T.R.

Cr. R. C. No. 90 of 1940
Cr. R P. No. 87 of 1940
February 1, 1940
LAKSHMANA RAO, J.

SIVAKALATHI GRAMANI
v.
EMPEROR.

Cr. P. C. (V of 1898), S. 106—Order under on a conviction under S. 75, Madras City Police Act.

On a conviction under S. 75 of the Madras City Police Act an order under S. 106, Cr. P. C. is not called for.

The Facts appear from the Judgment of the lower court which was as follows:

"The accused is charged by the Sub Inspector E. 2 station, Madras City under S. 15, City Police Act, in that the accused struck P. W. 1 (a lady) on her head with a club causing a bloody wound and creating a disturbance on the Ice House Road on the morning of 23-4-39.

I am convinced on the evidence on record that accused did assault a helpless woman in broad day-light and without any provocation whatever and I convict him under S. 75, City Police Act and sentence him to pay a fine of Rs. 25, in default to undergo rigorous imprisonment for one week. Rs. 20 out of the fine levied, will be paid to P. W. 1 as compensation.

As the police represent that accused is a rowdy and a terror to the people in the locality where he lives, I direct under S. 106, Cr. P. C. that he do execute a bond, himself, for the sum of Rs. 100 with two sureties for a like sum to be of good behaviour for one year."

This revision was filed on the following among other grounds:

"The lower court erred in accepting the representation of the police and binding over the petitioner under S. 106, Cr. P. C."

Petition under Ss. 435 & 439 Cr. P. C., 1898, praying the High Court to revise the order of the court of the special Honarary Presidency Magistrate, Egmore Madras dated 26—8—1939 and passed in N. C. No. 15715 of 1939.

A. S. Sivakaminathan, for Petr.

ORDER

The conviction is under S. 75 of the

* 1941 M.W.N. 221 (2)

City Police Act and the order under S. 106 of the Cr. P. C. is not called for. The order under S. 106, Cr. P. C. is therefore set aside and otherwise this petition is dismissed.

N T.R. —

Cr. R. C. No. 979 of 1939
Cr. R. P. No. 923 of 1939
February 9, 1940

LAKSHMANA RAO, J.

THE PUBLIC PROSECUTOR, MADRAS v SALMA BEEVI.

Cr. P. C. (V of 1898), Ss. 195 (1) (b) & 439—Complaint to village magistrate referred as false—Prosecution of complainant under S. 211, I. P. C.—Complaint by village magistrate, if necessary—Order discharging accused—Revision.

The accused made a complaint to the village magistrate against five persons of having committed dacoity but the police referred it as false and a notice was served on the accused to that effect and the accused did not appear before the magistrate. In a prosecution of the accused under S. 211, I. P. C. objection was taken before the charge in the sessions court that the committal was void for want of a complaint in writing by the village magistrate before whom the false charge was made by the accused. The sessions judge allowed the objection and discharged the accused.

Held, (1) *that there was no proceeding in any court so that a complaint by the magistrate was not necessary for the prosecution, and*

(2) *that a revision lay against the order of discharge.*

The Facts of the case will appear from the following extracts from the judgment of the lower court:

"2....The accused is a Muhammadan woman named Salma Beevi. She was living with her husband in the house of one Muhammad Adam Rowther and her husband himself was working under him for about 10 years as a servant. He misbehaved towards the mother of Muhammad Adam Rowther and was dismissed by Adam Rowther from his service. Adam Rowther also gave notice to the accused and her husband to quit the house, and his mother and her sister moved to the house where the accused and her husband were living on a Friday and were living in that house on Sunday following. The accused made a complaint, Ex. I to the village magistrate of Ravanasamudram on 2—10—1938 charging the said Muhammad Adam Rowther and four others with having committed dacoity by forcibly pushing her out of the house when she was alone there and when her husband was absent and Muhammad Adam Rowther frightened her with a gun and he and his party removed several articles from her house, which were worth Rs. 200, and took them away. The police investigated the complaint made by the accused and referred it as false and a notice was served on the accused to that effect. (See Ex. II). The sub divisional magistrate of Sermadevi who has committed this case, says that the accused did not file any complaint before him by way of protest against the referred charge sheet of the police and found *prima facie* that the charge made by the accused was false and committed the accused to this Court for trial under S. 211 I. P. C.

3. The refer notice, Ex. II, was served by the police on the accused on 15—1—1939 and the referred charge sheet was sent by the investigating police officer to the stationary sub magistrate of Ambasamudram on 22—1—1939 (See Ex. III). The sub magistrate agreed with the investigating police officer and ordered that the case be treated as false (See Ex. IV). It transpires that the accused in this case engaged a pleader on 8—11—1938 to present a complaint on her behalf in the case started by her against Muhammed Adam Rowther and others, but the pleader engaged by her has endorsed on the complaint that it was taken by him to the Singampatti camp of the sub divisional magistrate of Sermadevi to be presented in person by him but he was late and so he sent it by post to the sub divisional magistrate. That complaint has been produced by the accused along

* 1941 M.W.N. 222

with the present petition, and it is Ex. V. It contains an endorsement dated 10—11—1938 by the sub divisional magistrate of Sermadavi as follows: "Returned to the complainant. Cognisance of cases cannot be taken when complaints are sent by post." In the complaint, it is stated by the present accused that the sub inspector of Kadayam and Muhammad Adam Rowther were good friends and her husband therefore got the investigation of the case transferred to the Circle Inspector, and the Circle Inspector was not proceeding with it with necessary promptness and she is sure that she could not get justice at his hands and therefore requested the sub divisional magistrate to summon the accused and examine the prosecution witnesses and do justice.

4. Before the charge in the above sessions case was read out and explained to the accused, a preliminary objection was taken on behalf of the accused that the order committing the accused to this court for trial under S. 211 I. P. C., is void for want of a complaint in writing by the village magistrate, before whom the alleged false charge was made by the accused against Muhammad Adam Rowther and four others of having committed dacoity in her house on 2—10—1938, or by the Ambasamudram sub magistrate.

5. The learned additional public prosecutor contended that the argument of the defence was not sustainable for two reasons. In the first place, he stated that the sub divisonal magistrate was within his rights when he returned the complaint of the accused saying that he could not take cognisance of it as it was received by him by post and therefore there was no complaint by the present accused before him. As regards this argument, it may at once be stated that the action of the sub divisional magistrate was erroneous and he was not entitled in law to return the complaint on the ground that it was received by post. As already stated the case in 30 Cr. L. J. 732 is authority for the proposition that complaints to magistrates need not be presented in person and that magistrates can take cognisance of complaints presented to them other than in person and fix a date for the appearance of the complainants before him for examining them under S. 200, Cr. P. C. There is no substance therefore in the first ground taken by the Additional Public Prosecutor. The second ground taken by him was that the complaint must have been investigated by the magistrate and only in such a case a written complaint by the court in which the false charge was made or by some court to which that court is subordinate was required to enable the magistrate to take cognisance of a case under S. 211 I. P. C. This argument is also unsustainable. The rule in I. L. R. 54 Mad. 1018 is authority for the proposition that such a complaint would be necessary for taking cognisance of a case under S. 211, I. P. C., even if the original complaint preferred by the accused had not been judicially investigated by the magistrate (See page 1022). The Madras case just now quoted and the case in A. I. R. 1925 Pat. 483 support the defence contention that the sub divisional magistrate was barred from entertaining the police charge sheet under S. 211 I. P. C. against the accused because of the absence of written complaint by the sub magistrate of Ambasamudram. The defence contention seems therefore to be valid. The commitment by the sub divisional magistrate must be held to be legally invalid because of the absence of a written complaint by the sub magistrate to the sub divisional magistrate against the accused. In such a case, it is laid down in 56 M. L. J. 208 that, if at any stage the court finds a legal bar to the prosecution of the case, it would be acting rightly in discharging the case. I find there is a legal bar in this case to the entertainment by the sub divisional magistrate Sermadevi, of the police chargesheet under S. 211, I. P. C. and the preliminary enquiry by that magistrate has been irregular because of the legal bar and the accused cannot be prosecuted under S. 211, I. P. C. I therefore discharge the accused. Her bail bond will be cancelled."

The present revision was filed on the following grounds;

"1. The learned assistant sessions judge erred in holding that the committal of the accused was invalid.

2. The learned assistant sessions judge erred in holding that S. 195 (1) (b) was a bar to the trial of the accused.

3. The learned assistant sessions judge ought to have held that the offence under S. 211 I. P. C. alleged to have been committed by the accused was not in relation to any proceedings in court.

4. The assistant sessions judge ought to have held that the subsequent complaint sent by post to the sub divisional magistrate was not properly presented.

Petition under Ss. 435 & 439 Cr.P.C, 1898 praying the High Court to revise the order of the assistant sessions judge of the court of sessions of the Tinnevelly division dated 3-8-1939 and made in C. C. No. 44 of 1939.

Public Prosecutor (V. L Ethiraj) in person.

G. Gopalaswamy, for Respt.

ORDER

The trial in the sessions court commences only after the charge is read over and the accused claims to be tried, and the preliminary objection that the proper remedy is an appeal against the order of the assistant sessions judge cannot be upheld.

On the merits, the complaint of the respondent was referred by the police and she did not appear before the magistrate. There was no proceeding in any court and the view of the assistant sessions Judge that a complaint by the magistrate is necessary for the prosecution of the respondent under S. 211, I P. C. in respect of a cognisable offence is untenable. The order of discharge is therefore set aside and the assistant sessions Judge will proceed with the case in accordance with law.

N.T.R. — *Petition allowed*

Cr. R. C. No. 1006 of 1940
Case Ref. No. 43 of 1940
January 23, 1941

HORWILL, J.

Pothapu TIMMA REDDI
v.
Kondalu RAMI REDDI

Cr. P. C. (V of 1898), S. 523—Filing of referred charge sheet as offence not cognisable—Magistrate if can make order as to custody of property.

Where the police started investigation into a case as an offence coming under, S. 411 I. P. C. but came to the conclusion that the offence committed was one under S. 403 I. P. C., which is not cognisable, and the police sent a referred chargesheet to that effect, the magistrate has a discretion under S. 523 Cr. P. C. to pass orders with regard to the disposal of property which is the subject matter of the complaint.

Case referred for the orders of the High Court under S. 438 Cr. P. C. by the district magistrate of Cuddapah in his letter Ref. C. I. No. 1234 of 1940 dated 15th November 1940.

Public Prosecutor (V. L Ethiraj,) for Crown.

P. Chandra Reddi, for Complainant.

ORDER

One Kondalu Rami Reddi was given posession of a cow and a calf by its owner for the purpose of grazing in a certain forest. While there, this cow and calf were missing and the information of the complainant was that it had been stolen by Sugalis. According to the facts found during the police enquiry, the complainant searched for these cattle for many months and at last traced them to the house of the accused. The accused said that the cow and calf were his and that he purchased them long before from some Sugalis. As he would not return them, the complainant informed the police, who investigated this as an offence coming under S. 411, I. P. C. They came to the conclusion, upon the acceptance of certain information, that the offence committed was not one punishable under S. 411, I. P. C. but one under S. 403 I. P. C. which is criminal misappropriation. This offence is not cognizable and so the police sent a referred charge sheet to that

* 1941 M.W.N. 224

effect. The magistrate agreed with the police and ordered the cattle to be returned to the complainant. The accused preferred an appeal to the district magistrate who, as no appeal lay, had to dismiss it: but he nevertheless considered that the Taluk Magistrate had erred in not returning the property to the person from whom it was recovered. He thereupon made a reference to this Court for action under S. 438, Cr. P. C.

The District Magistrate relied on a case reported in *Paidi Subbayya* v. *Emperor* [1], in which Lakshmana Rao, J. considered a case where a complaint of theft had been preferred and the case eventually struck off as being of a civil nature. That case is clearly distinguishable from the present one. Where a case is struck off as being of a civil nature, it means that the magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a civil court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken, and to direct the complainant to have recourse to a civil court if he is so advised. In the present instance, the magistrate was of opinion that an offence had been made out, but that it was one of misappropriation and not of the receipt of stolen property knowing or having reason to believe the same to be stolen. The magistrate, in disposing of property which is the subject matter of a complaint, has a discretion. S. 523 empowers the magistrate to pass orders with regard to the disposal of property which is alleged or suspected to have been stolen or is found under circumstances which create suspicion of the commission of any offence. These conditions were fulfilled here and I am not prepared to say that the learned magistrate did not exercise his discretion judicially.

Notice has gone to the accused in this case but he has not put in any appearance.

The reference is not accepted and the papers will be returned.

N.T.R.

1. [1939] M.W.N. 739; Cr. 103 (2)

Cr. R. C. Nos. 789 & 790 of 1940
Cr. R. P. Nos. 744 & 745 of 1940

January 29, 1941

HORWILL, J.

RAMANUJAM APPALASWAMY & others
v.
EMPEROR.

Companies Act (VII of 1913), S. 76 (2) — Delay condoned by registrar — Prosecution.

Where the Registrar of Companies has condoned the delay in holding a general meeting, the directors cannot be convicted under S. 76 (2) Companies Act.

Whether the Registrar can condone delay in holding a general meeting?

PETITIONS under Ss. 435 and 439 of the Cr. P. C. 1898, praying the High Court to revise the judgments of the Court of the Sub-Divisional Magistrate of Vizianagaram dated 2—9—40 and passed in C. C. Nos. 90 and 89 of 1940 respectively

S. Suryaprakasam, for Petrs.
K. Venkataragavachari, for Crown.

ORDER

CRIMINAL REVISION CASE No. 789 OF 1941:— The petitioners were convicted by the Sub-Divisional Magistrate of Vizianagaram under S. 76 (2) of the Indian Companies Act for not holding a general meeting of the company of which they are the directors within eighteen months from the date of the incorporation; and they have been sentenced to a fine of Rs 50 each.

One of the defences of the petitioners was that the Registrar had condoned the delay. He was examined as a witness and he says;

"List of members and summary of the share capital under S 32 was delayed. The Registrar of Joint Stock Companies condoned that delay. That has nothing to do with the subject matter of this case"

The letter of the Registrar, which is Ex. 1 says in paragraph 2:

"The delay in holding the general meeting is condoned and the list of members and summary is filed this time."

This letter would appear to condone the failure of the petitioners and the other directors to hold a general meeting within eighteen months as required by S. 76.

The learned Sub-Divisional Magistrate, in convicting the petitioners, says:

"The letter dated 14—3—40 (Ex. 1-a) of the company to the Assistant Registrar (P.W.1) is about the

list of annual members and summary and notice of change in directors. The letter R. C. No. 72 of 1940 dated 7—5—40 of the Assistant Registrar is a reply to Ex. 1-a. The Assistant Registrar stated that the condonation was of the delay in filing the annual list of members and summary only."

It is true that the directors did not ask expressly in their letter Ex. 1-a to have their delay in holding a general meeting condoned; but the Assistant Registrar, who knew that he would have to condone the failure to hold a general meeting if he had to condone the delay in sending up a list of members and summary, also condoned the delay in holding a general meeting. This is clear from Ex. 1. The learned Sub-Divisional Magistrate therefore found the petitioners guilty under a misapprehension.

I have asked the learned counsel for the petitioners as well as the learned Public Prosecutor—Whether there is any provision in the Companies Act whereby the Registrar can condone the delay in holding a general meeting, and they have been unable to point out any such provision. S. 131 enables the Registrar to condone only the sending up of balance sheets. It was not however contended in the lower court that the Registrar had no such power; and so I do not think that any decision on that point is called for here.

The criminal revision case is allowed and the conviction and sentence are set aside.

CRIMINAL REVISION CASE No 790 OF 1940:- This case is connected with Criminal Revision Case 789. The petitioners have been convicted under S. 131 of the Indian Companies Act of not having laid before the general body within eighteen months of the incorporation of the company a balance sheet. As has been found in Criminal Revision Case 789, the Registrar condoned the delay in holding a general meeting. He must therefore be deemed to have condoned the delay in filing a balance sheet before the general body at its meeting. The acquittal of the petitioners in the connected case implies that they are not guilty of the offences with which they have been charged in this case.

This Criminal Revision Case is therefore allowed and the conviction and sentence are set aside.

N. T. R. *Conviction set aside.*

S. A. No. 1071 OF 1937

November 5, 1940

ABDUR RAHMAN, J.

VATTAPPA KONE & another
v.
MUTHUKARUPPAN SERVAI

Malicious prosecution—False complaint to village magistrate—No summons to plaintiff—Suit for damages.

A suit for damages for malicious prosecution is not maintainable when no summons was issued to the plaintiff on a verbal complaint made against him to a village magistrate charging him with the offence of robbery.

Statements made in a complaint to a magistrate are absolutely privileged and a suit for damages does not lie.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Ramnad at Madura in A. S. No. 58 of 1937 (A. S. No. 195 of 1936, District Court, Ramnad preferred against the decree of the Court of the District Munsif of Paramakudi in O. S. No. 158 of 1935.

T. R Srinivasan, for Applts.

R. Srinivasa Iyengar, for Respt.

JUDGMENT

The only question to be determined in this appeal is whether a suit for damages for malicious prosecution would be maintainable when no summons was issued to the plaintiff on a verbal complaint made against him to a village Magistrate charging him with the offence of robbery. The facts may be briefly stated. Defendants 1 and 2 were stated to have lost some sheep on the 8th September, 1934. They went on the next day to the village Magistrate of Mudukalathur and made a statement to him that certain persons including the plaintiff had taken away their sheep by force. The facts stated by the defendants would have made the persons charged liable to be prosecuted for robbery. The village Magistrate sent a report on the same day to the police and to the Stationary Sub-Magistrate. The Magistrate appears to

have ordered an enquiry by the police which made a report on the 15th January, 1935 that the complaint made by the defendants 1 and 2 was false and that no robbery had taken place in fact. He (the Magistrate) thereupon declined to take any further action and the proceedings were dropped. During the enquiry conducted by the police, the plaintiff was not even summoned. He says that he was not called by the police as he had apprehended an arrest and run away after he came to know of the complaint. The plaintiff brought a suit for damages for malicious prosecution on these allegations. It was decreed by the district Munsif of Paramakudi and the decree was confirmed by the Subordinate Judge of Ramnad, at Madura. The question to decide is whether in those circumstances an action for damages was competent.

From the facts which have been given above it would be clear that the plaintiff was not prosecuted and he could not for that reason, bring an action for damages for malicious prosecution. If any authority is required for that view, it would be found in *Sheik Meeran Sahib* v. *Ratnavelu Mudali* [1] and in a later decision of a Division Bench of this Court in *Sanjeevi Reddy* v. *Koneri Reddy* [2]. These two decisions were followed by Sir Owen Beasley in *Arunachalam Mudaliar* v. *Chinnaswami Chetty* [3].

But it has been contended on behalf of the respondent that his suit was not one in respect of malicious prosecution but for bringing a false charge which is different from either defamation or malicious prosecution. This was attempted to be supported by a decision in *Nagendranath Ray* v. *Basanta Das Bairagya* [4] where the following dictum of Sir Lawrence Jenkins C. J. in *Golap Jan* v. *Bholanath Khetty* [5] was cited with approval. The dictum of the learned Chief Justice was as follows:

> "There are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution."

This does not however remove the real difficulty. The statement or complaint to a police officer is not first of all covered either by the kindred wrongs mentioned by Sir Lawrence Jenkins in *Golap Jan's case* [5] or by other well known actionable wrongs such as those of false imprisonment etc. And, secondly, statements made in a complaint to a Magistrate or even to a 'police officer which could only be made with a view to their being repeated on oath before the Magistrate were held in this Presidency to be absolutely privileged.' This was held by Sir Murray Coutts Trotter C. J. in *Sanjivi Reddy* v. *Koneri Reddy* [2], and followed by my learned King, J. recently in *Bapalal & Co.* v. *Krishnaswami Iyer* [6].

The third difficulty in the plaintiff's way appears to be insurmountable even if the allegations made by the defendants 1 and 2 in their statement to the village Magistrate are held to be defamatory. Defamation is undoubtedly one of the actionable wrongs; but in order to prove the same one must be able to put those allegations in evidence. If they are found to have been made on an occasion which is found to be absolutely privileged, as held in *Sanjivi Reddy's case* [2], they could not be permitted to be referred to and the contention raised by learned counsel for the respondent must be for that reason alone repelled. My attention was drawn by him to the Full Bench decision in the *Sessions Judge of Tinnevelly* v. *Sivan Chetty* [7]. It has no application as the only question raised in that case was whether a person giving false information about an alleged offence to a village Magistrate could be prosecuted for an offence under S. 211 I. P. C. I am not concerned here whether the defendants had committed an offence under S. 211 or not. As the making of a false charge or the institution of a criminal proceeding with intent to injure knowing that

1. [1912] 37 Mad. 181
2. [1926] 49 Mad. 315
3. [1926] 24 L.W. 22
4. [1929] 57 Cal. 25
5. [1911] 38 Cal. 880
6. [1940] M.W.N. 1054
7. [1909] 32 Mad. 258

there is no just or lawful ground for such a charge or proceeding is itself an offence, the reference to the charge made by a person or to the proceeding taken by him cannot obviously fall within the doctrine of absolute privilege applied by the learned Chief Justice, to *Sanjivi Reddi's case* [2]. But the position becomes changed when one comes to deal with the charge or complaint in a collateral proceeding such as a civil suit for damages for defamation. The Full Bench decision would therefore have no application to this case. Reliance was again placed on behalf of the respondent on *Peria Goundan* v. *Kuppa Goundan* [8]. The facts of that case do not seem to have been given in the report very fully. I sent for the original records and found that the plaintiff was actually prosecuted by the police in that case and a charge was framed against him by the Deputy Magistrate of Salem but he was eventually acquitted. It is clear in those circumstances that the plaintiff was actually prosecuted and a suit for damages for malicious prosecution was if I may say so with respect rightly held to be maintainable.

For the above reasons I am constrained to accept the appeal and dismiss the suit, but in the circumstances of the case I leave the parties to bear their own costs throughout.

Leave refused.

N.T.R. — *Appeal allowed*

PRIVY COUNCIL

(Appeal from Swaziland)

May 7, 1940

LORD THANKERTON, LORD JUSTICE GODDARD, & SIR PHILIP MACDONELL

FAKISANDHLA NKAMBULE
v.
KING

Privy Council—Criminal appeal—Practice.

Where (1) in a joint indictment of two persons one of them pleaded guilty but under the practice of the court it was agreed that a plea of not guilty should be entered, but no alteration of the plea of guilty was made in the record and (2) the English translation of a letter was not sworn to, but was used at the trial and there was a mistake therein as to the meaning of a particular sentence, but the corrected translation did not effect any material change in the meaning,

Held, *though these were irregularities, they were not of such a character as would justify interference by the Privy Council with the decision appealed from.*

Horace Douglas, K. C. & S. N. Bernstain. for Applt.

The Solicitor – General; (Kenelm Preedy) for Respt.

JUDGMENT.

SIR PHILIP MACDONELL This is an appeal by special leave from the Special Court of Swaziland which had convicted the appellant of murder. The appellant and a certain Nhloko Hlatshwako, who will be referred to hereafter as the first accused, were indicted before the Special Court of Swaziland for the murder of certain three persons, the first accused as having actually committed the murders and the second accused, the appellant, as having incited him to commit them. The Special Court convicted them both but it is only the second accused who appeals.

The appellant is a native chief in Swaziland, a territory under the protection of the Crown and governed as to the law of evidence by the Transvaal Proclamation No. 16 of 1902 and as to criminal procedure by the Transvaal Cr. P. C. Ordinance No. 1 of 1903. The essential facts in the case were these. The appellant's mother died in 1936 and a daughter of his in 1937 and somewhere in July or August of 1937 he sent his "doctor" the witness Nyandeni to find some one who had the knowledge and skill necessary to make a rope and put it on the graves of these two deceased persons so that by its agency the dreams troubling him might be turned from him and those responsible for the two deaths discovered; the rope it was believed, would by some inherent magic kill the persons responsible. The witness Nyandeni eventually found the first accused who, according to him, undertook to perform this rope cere-

8. [1919] 37 M.L.J. 234

mony. The appellant had duties as Court "induna" at Hlatikulu, the Chief town of Swaziland, which kept him there during the weekdays, and following on instructions by him, the witness Nyandeni worte a letter A which was signed in the name of the appellant, and was addressed and duly delivered to the first accused. This letter states *inter alia* that the appellant's children "are finished" i.e., dead, that the person killing them is at the appellant's village, that the appellant is busy and cannot come personally, that the first accused must bring all his medicine bags with him, that "it is the Chief Fakisandhla who is calling him" and that the "advance payment" is ready. In accordance with this letter the first accused came to the witness Nyandeni's village on a day which can be fixed as Thursday September 9, 1937 and Nyandeni wrote to the appellant saying that he had arrived. In reply the appellant dictated to the witness Memorial two letters, B addressed to Nyandeni, and C addressed to the first accused, both in the same envelope, and it is in evidence that the contents of each letter became known to Nyandeni and to the first accused. In letter B the appellant says that he understands that the first accused has arrived and is unwilling to do the work until he has seen him, the appellant, but that his duties at Hlatikulu prevent him from coming. Letter B goes on, "it is necessary that this man (i- e., the first accused) should carry on because you know that it is Mpindela, Mbuko, Majalimane and Ngilane". The first two of these so named are two of the three persons proved to have been murdered by the first accused; the other two persons named were at all material times absent and at a distance. The next words in letter B, according to the translation before the Court at the trial, were "as far as the others are concerned, the medicine will take its course", but according to affidavits sworn after the trial and put in as part of the printed record before their Lordships, this portion of the letter should have been translated "on the other hand, the work itself will simply proceed" with no mention of medicine. In this letter B the appellant then speaks of advance payment and enjoins stealth or secrecy, in doing the work, also that no one must be told. In letter C the appellant tells the first accused that he understands what he is saying and that he will himself come on Sunday. Nyandeni and the first accused will have received these letters on Friday, September 10, 1937, and the same day they went to one of the appellant's villages called Buseleni where Nyandeni pointed out to the first accused Mpindela and Mbuko, named in letter B, and also one Patekile, a woman, whose name was not in letter B but whom the appellant said he had mentioned to the witness Memorial when dictating that letter to him. It is clear that somehow her name was mentioned and had become known to Nyandeni and the first accused. As some of the members of the village were absent Nyandeni and the first accused did nothing that day, but returned to Nyandeni's village. Next morning, Saturday, September 11, they came again to the village Buseleni, and the first accused, with the inhabitants ranged in a half circle before him, proceeded to conduct a witch doctor enquiry. He had two earthenware pots, one on a fire, and a smaller one which he held up to his breast. On his own admission the smaller pot contained two separate substances, one harmless, the other arsenic, and by a little manipulation he administered the harmless substance to the rest of the village but arsenic to the two persons, Mpindela and Mbuko, mentioned in letter B, and also to Patekile, whose name the appellant says ought to have been in letter B, whereby these three persons died the same day. Admittedly nothing was done with regard to the rope which, according to the appellant and the witness Nyandeni, the first accused had been called in to make. Nyandeni, who throughout his evidence sought to exculpate the appellant, had to admit that the first accused had said earlier that he would use the earthenware pot, a thing

that would have nothing to do with the rope ceremony but which could be used to give the villagers something from it to swallow and so to test their responsibility for the matter to be discovered, whatever that might be.

On Sunday, September 12, the appellant came over to Nyandeni's village as he had promised and gave the first accused £2 10 s, and a promise of some cattle. His behaviour at this interview with the first accused was inconsistent with his having ordered any rope ceremony—and since no rope had at that time been made the first accused had not done anything then to earn any payment—and was evidence that he had called in the first accused for the purposes of killing the three deceased persons His letters and his behaviour on the Sunday were corroboration of the evidence of the first accused, that the appellant had sent for him to kill these three people as being responsible for the deaths of his mother and daughter, and had never asked the first accused to do the rope ceremony at all. Assuming that the evidence of the first accused was admissible and that the letters were properly before the Court of trial, it had before it sufficient evidence for finding the appellant guilty of inciting the first accused to commit these murders.

Two main points were urged to their Lordships in support of this appeal.

When the first accused and the appellant as second accused were arraigned, the appellant pleaded not guilty. The first accused pleaded guilty but prior to his doing so his Counsel said that his client intended to make a full confession of the murders but would also say "in defence" that he had committed them at the instigation of the appellant, a tribal chief, and in the belief that the paramount Chief of the tribe knew what he was doing. The president of the Special Court said that he thought the proper course was to enter a plea of not guilty in the case of each accused. The Attorney-General, appearing for the Crown, agreed to this but there is nothing on record as to whether the several Counsel for first accused and for appellant said anything; presumably they consented to the Court's suggestion. The Clerk of the court had entered on the record a plea of guilty for the first accused and no alteration of this plea was at any time made on the record. The trial then proceeded as a joint trial of the two accused as if each had pleaded not guilty. For the defence the first accused and the appellant each gave evidence and were cross examined by the Attorney-General and each was cross-examined on behalf of the other accused. The evidence of the first accused, an accomplice implicated the appellant as having incited him to murder the three deceased.

It was argued before their Lordships that this procedure was wrong by reason of S. 20 of the Transvaal Proclamation No. 16 of 1902, "No confession which may be made by any person shall, in any case be admissible as evidence against any other person", and that the correct procedure in accordance with that section and with Transvaal practice thereon would have been to take evidence *aliunde* that the crime charged had been committed, and then to have sentenced the first accused on his plea of guilty, thereafter calling him as a witness for the Crown, on the principle that before his evidence could be used to implicate any person mentioned therein he should by reason of having already been sentenced, have nothing to fear or hope when giving that evidence. In the present case however, being one of murder, one sentence only was possible. Counsel for the appellant cited the case of *Rex v. Fatshawa* [1] where the Transvaal Provincial Division quashed a conviction in which a third accused after plea of guilty, but before sentence, gave evidence against the two other accused. In that case, however, the third accused, after his plea of guilty, though invited to take part in the case by asking questions declined to do so, the only thing he did being to give at the end of the case for the Crown evidence, part of which implicated the other two accused. That case then is

1. [1930] S.A.L.R. Trans. 526

distinguishable as not having been a trial of that third accused jointly with the two other accused while the present case, in the course it took, was a joint trial of the two accused, as if on a plea of not guilty for each of them. Further it would appear that South African practice does permit a Court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty if it considers that he does not properly understand the effect of that plea or if he seems to have matter of exculpation that he wishes to allege; see *Gardiner and Landown, South African, Criminal Law and Procdure,* 2nd edition Vol. 1 at pp. 238, 255 & 257 Here the first accused through his Counsel said that he wished to state certain facts—which therefore would need proof—that he though furnished some defence for what he had done, namely that the man inciting him was a chief and that the Paramount Chief knew what he intended to do. There was some authority then for the procedure of the Court in this case though it certainly was irregular to allow the first accused's plea of guilty to remain on the record and not to alter it to one of not guilty. The difference between what the Court did do and what strictly it would seem that it ought to have done in accordance with S. 20 of the Transvaal Proclamation No. 16 of 1902 and the practice thereon amounted to this:—If the first accused had been sentenced before giving evidence and had then been called as a witness for the Crown, the Attorney General could not have cross-examined him; in the course taken the first accused was witness for the defence so the Attorney-General could and did cross-examine him. But in either event it would still have been necessary to corroborate his evidence and it cannot be said that the departure from what apparently is the correct Transvaal procedure was departure of substance from the principles of justice. In connection with this S. 20 of Transvaal Proclamation No. 16 of 1902 making confessions inadmissible, reference was made to the case of *Rex* v. *Zawels* [2], where Curlewis, C. J., said that on a joint indictment and a joint trial evidence given by one of the accused is admissible against the other, adding "if in the course of giving such evidence one of the accused makes an admission of his guit amounting to a confession, though such admission may not be admissible as evidence ......against any other of the accused, but only as against himself, the rest of his evidence stands as admissible like that of any other witness so far as it incriminates any of the other accused of the charge for which they are being tried" which is the case here; the evidence of the first accused that the appellant had incited him to commit the murders was no part of his confession of having committed them. In the opinion of their Lordships the irregularity of leaving on the record a plea of guilty after in effect altering it to one of not guilty did not entail any real prejudice to the appellant.

The other argument in support of this appeal turned on the letters produced, letter A written by the witness Nyandeni in the name of the appellant, and letters B. & C. written by the witness Memorial at the appellant's dictation. The originals in the Swazi tongue were produced and sworn to but the language of the Court was English and no one was called to prove their English meaning, that is a translation. An English translation was put in and used at the trial but was not sworn to and it would seem that, as stated above, there was a mistake therein, as to the English meaning of a particular sentence in letter B. If there was no evidence produced to the Court as to the meaning in English of those letters, then the Court could not look at them and their contents would not be before it. (It is quite possible that all parties to, the case accepted by consent the translation which had been made, but not sworn to.) Detailed examination of the evidence given at the trial shows, however, that the meaning in the three letters of each sentence implicating the appellant was proved though in piecemeal fashion. The witness Nyandeni was taken through each material

2. [1937] S.A.L.R. App. Div. 342.

sentence in letter A and admitted each to give correctly what the appellant had dictated to him, and the Court interpreter will have rendered Nyandeni's answers into English. The material sentences in letters B & C were put to the appellant, and he admitted that he had dictated these to the witness Memorial; again the interpreter will have rendered his answers into English. In these sentences so proved the appellant requested the first accused to bring his medicine-bags—obviously with medicine in them—named the persons to whom the attention of the first accused was to be directed, and enjoined secrecy and that nobody was to be told. In the opinion of their Lordships the words wrongly supposed to be in letter B do not materially add to or diminish the incriminating nature of other passages in that letter, and their corrected translation does not effect any material change in their meaning.

Their Lordships are satisfied that if the Court of trial had had before it a correct instead of an incorrect translation of the disputed words in letter B, it must still have arrived at the same conclusion that it did arrive at, namely that the appellant incited the first accused to commit these murders.

Their Lordships regret the irregularities in the trial of this case but are satisfied that they are not of such a character as would justify interference with the decision appealed from. The scope of such interference is well understood and it is only necessary to cite the words of Lord Watson in *Dillets case* [3].

"The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done"

and it is clear that no such injustice has been done in the present case.

Their Lordships therefore are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly.

— *Appeal dismissed*

3. [1887] 12 A.C. 459 (467)

Cr. R. C. No. 123 of 1940
Cr. R. P. No. 117 of 1940
February 8, 1940
LAKSHMANA RAO, J.

KODIYALA CHANDRIAH & others
v.
EMPEROR

Cr. P. C. (V of 1898), S. 35 — Conviction under Ss 147 & 341 I. P. C. — Separate sentence.

The offence under S. 341 I. P. C. is involved in the offence of unlawful assembly and on a conviction under S. 341 I. P. C. and for unlawful assembly, a separate sentence under S. 341 is not called for.

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the Taluk Ist class magistrate, Nandigam in C. C No. 342 of 1938.

K. S. Jayarama Ayyar & P. Sivaramakrishnayya, for Petrs.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

The offence under S. 341 I. P. C. is involved in the offence of unlawful assembly and the separate sentence of fine under S. 341 I. P. C. is not called for. The sentence of fine under S. 341 I. P. C. is therefore set aside and otherwise this petition is dismissed.

N.T.R. —

Cr. App. No. 199 of 1940
August 1, 1940

LAKSHMANA RAO, J.

HUSSIAN KHAN alias Sulaiman Khan & another
v.
EMPEROR.

Children Act (*Mad. Act* IV *of* 1920), *S.* 26 (1) *—Father, when can be directed to pay fine under.*

A young person was convicted under S. 326 I. P. C. and sentenced to a fine. The father of the accused was presnt in obedience to a notice under S. 21(1), Children Act and he was directed to pay the fine under S. 26(1). But no opportunity was given to him to show that he had not conduced to the commission of the offence by neglecting to exercise due care of the accused and it did not appear that the offence was due to the neglect of the father.

Held, *that the order under S. 26 (1), Children Act must be set aside, but the proper course was to commit the accused to the custody of his father on his executing a bond to be responsible for the good behaviour of the son.*

FACTS: The order appealed against was as follows: "Charge under S. 326 I. P. C.

The boy admits the offence. I find him guilty of the offence with which he is charged and convict him and sentence him to pay a fine of Rs. 50. Under S. 26 (1) of the Children Act the boy's father Abdul Khan will be ordered to pay the fine of Rs. 50 levied on his son. The fine if paid will be paid to the injured man as compensation."

The appeal was preferred on the following grounds:

"The lower court has not recorded any finding under the latter part of S. 26 (1) whether the father has conduced to the commission of the offence or neglected to exercise due care of the young person. In the absence of such a finding the order on the father is against law.

The offence being a sudden one the order on the father is illegal and unsustainable. It was not as if the father was allowing the son to commit theft or such other offence himself profiting by the act of the son."

Appeal against the order of the Juvenile court, Vepery. Madras dated 7—2—1940 and passed in J. C. No. 49 of 1940.

P. A. Krishna Kutti Nair for Applts.
Crown Prosecutor, for Crown.

JUDGMENT.

The first appellant, a young person pleaded guilty to a charge under S. 326. I. P. C. and he was sentenced to pay a fine of Rs. 50. The second appellant, the father, was present in obedience to the notice under S. 21 (1) of the Madras Children's Act and he was directed to pay the fine under S. 26(1) of the Act. But no opportunity was given to him to show that he had not conduced to the commission of the offence by neglecting to exercise due care of the first appellant nor does it appear from the report of the probation officer that the offence was due to any neglect of the father. The order under S. 26(1) of the Madras Children's Act is therefore set aside and on the materials on record the proper course was to commit the first appellant to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. The sentence of fine is therefore set aside and the first appellant will be committed to the custody of the second appellant on his executing a bond for Rs. 100 to be responsible for the good behaviour of the first appellant for one year.

N.T.R.

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Cr. R. C. No. 967 of 1940
Cr. R.P. No. 920 of 1940
February 5, 1941
HORWILL J.

V. S. SOMASUNDARAM
v.
EMPEROR

Defence of India Rules, 1939, *R*. 34(6) (*b*) (*d*) (*c*) & (1)—*'Prejudicial act'*, *what is*.

The petitioner, in the course of a speech which was a tirade against the police, said that although they are poorly paid men of no status yet they give themselves airs and strut about doing no work; and he suggested that they were acting against the workers in the interests of the capitalists and the speech also contained threats of what might be done to the police if they continued as they are at present,

Held, *the speech does not amount to a 'prejudicial act' as defined in r*. 34 (6), *Defence of India Rules*.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the the judgment of the court of the Chief Presidency Magistrate Egmore, Madras, dated 14th October 1940 and passed in C. C. No. 2701 of 1940.

S. Suryaprakasam, for Petr.
Crown Prosecutor, for Crown.

ORDER.

The petitioner has been convicted under R. 38 of the Defence of India Rules for having done a prejudicial act and sentenced to imprisonment till the rising of the court and to a fine of Rs. 50.

"Prejudicial act" is defined in R. 34 (6). Many groups of prejudicial acts are described in this rule; but the learned Crown Prosecutor relies on sub-cls. (b), (c), (d) and (1). The learned magistrate has not referred in particular to any of these subclauses. but has merely said that the speech of the petitioner is a prejudicial act, which is punishable under R. 38 (5). The speech of the petitioner consisted of a tirade against the police. He said that although they are poorly paid men of no status, yet they give themselves airs and strut about doing no work. He suggests that they are acting against the workers in the interests ot the capitalists. The speech also contains threats of what might be done to the police if they continue as they are at present.

Cl. (b) of r. 34 (6) is "to cause disaffection among, or to prejudice, prevent or interfere with the discipline, health or training of, or the performance of their duties by, members of His Majesty's forces or public servants." This speech was certainly not intended, nor was it likely to cause disaffection among the members of the police force, although it might cause disaffection among the public against the police force. It seems to me that the speech of the petitioner did make him guilty of an offence under S. 124-A of the Penal Code for sedition: but it was not a prejudicial act within the meaning of r. 34 (6) (b).

Cl. (c) is, "to render any member of His Majesty's forces or any public servant incapable of efficiently performing his duties as such, or to induce any member of His Majesty's forces or any public servant to fail in the performance of his duties as such." It would need a great stretch of imagination to make the speech or the remarks of the petitioner fit into this clause.

Cl. (d) is, "to prejudice the recruiting of, or the attendance of persons for service in, any of His Majesty's forces or any police force or fire brigade or any other body of persons entered, enrolled or engaged as public servants." All that can be said with regard to the application of this clause is that the members of the public might possibly be inspired by fear of what the workers would do to them if they joined the police force, if they came to know what was said and took it seriously, but the speech was not likely to have that effect because it was addressed to the workers who presumably had no intention of becoming constables.

Subclause (1) applies more nearly than any of the others and runs, "to instigate directly or indirectly the use of criminal force against public servants generally or any class of public servants or any individual public servant." Although the speech is a strongly worded one, I do not think that it can be said that the petitioner in-

tended to instigate the use of criminal force against public servants, nor do I think that what he said was likely to have that immediate effect. The speech was not an incitement to personal voilence, but rather an exposition of the part that the police were playing as the agents and tools of capitalists in preventing the workers from expressing their grievances and securing their rights. If the speech is read as a whole it is difficult to spell out any incitement to attack or to use force against the police, although it might cause disaffection against them. In fact, the learned Crown Prosecutor does not rely very strongly on this sub-clause, but rests the case for the Crown rather on sub-clauses (b), (c) and (d). The learned magistrate, while saying that there was a prejudicial act does not say why.

The petition is allowed and the conviction and sentence set aside. The fine is said to have been paid and there will be an order that it should be refunded.

N.T.R. — *Petition allowed*

Cr. R. C. No. 24 of 1940
Cr. R. P. No. 21 of 1940

July 31, 1940

LAKSHMANA RAO J.

Vasireddi SIVALINGA PRASAD
v.
EMPEROR

Penal Cade (XLV of 1860), S. 504—Abuse of a person not present in the course of a speech —Offence.

Where the accused abused Z and her agents in the course of a speech, but neither Z nor her agents were present at the time, the accused cannot be convicted under S. 504 I. P. C.

FACTS: The complaint was filed by the Kamatham agent of the Zamindarini against the accused for an offence under S. 504, I. P. C. The accused addressed a meeting in front of complainant's house and made certain insulting remarks against the Zamindarini with the intention of giving direct provocation to the adherents of the Zamindarini who were present at the meeting and knowing that such provocation would in all probability lead to a breach of the peace. The sub divisional magistrate convicted the accused for an offence under S. 504, I. P. C. and observed "The prosecution has established the intention of the accused to offer grave provocation to the supporters of the Zamindarini. The accused appears to be a socialist worker or preacher and he must have known that his speech would cause a breach of the peace."

Petition under Ss. 435 & 439 Cr.P.C. 1898, praying the High Court to revise the order of the court of the joint magistrate of Bezwada in C. C. No. 13 of 1940.

A. Lakshmayya, for Petr.
Public Prosecutor (V.L. Ethiraj), for Crown.

ORDER

The petitioner was an organising secretary of the Andhra Provincial Ryots Association and he addressed a meeting of the Ryots of Peddavaram in the open space in front of the house of P. W. 1, the Kamatham agent of the Zamindarini of Muktyala on the night of the 21st January last. He abused the Zamindarini and her agents in the course of his speech on the inam legislation, but neither the Zamindarini nor her agents were present at the meeting and as rightly conceded the conviction of the petitioner under S. 504, I.P.C. is unsustainable. It is therefore set aside and the fine if levied will be refunded.

N.T.R. — *Conviction set aside.*

Cr. Apps. Nos. 762 & 763 of 1940

January 23, 1941

HORWILL, J.

SUBBARAYA AYYAR
v.
EMPEROR

Cr. P. C. (V of 1898), Ss. 297 & 298—Charge to jury—Several accused—Evidence against each accused to be marshalled—Evidence Act, S. 27—Charge under S. 401 I. P. C.—Recovery of stolen articles in consequence of statement by accused—Admissibility.

Where a number of accused are tried together on a charge under S. 401, I. P. C. and a considerable body of evidence is let in, there is a danger that the jury might decide by general impressions rather than by a memory of the actual facts proved in evidence. The Sessions Judge should conclude his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there was against each of them.

Ordinarily, where the Sessions Judge omits to marshall the evidence against each accused separately, the case should be remitted for fresh trial; but where the evidence against the accused is slight, it is not necessary to subject them to a fresh trial.

Where one of the accused on a charge under S. 401 I. P. C. made a confession proving that he was connected with the gang in a particular theft and certain articles of clothing were recovered from him in consequence of this confession.

Held, *the confession was admissible under S. 27, Evidence Act, as it led to the discovery of articles which were the subject of the theft.*

Appeals against the order of the court of session of the Trichinopoly division in C. C. No. 35 of 1940 dated 12—9—1940.

V. V. Radhakrishnan & G. Gopalaswami, for Applts.

K. Venkataraghavachari, for Crown.

JUDGMENT.

Fourteen men were charged by the Sessions Judge of Trichinopoly with being members of a gang associated for the purpose of habitually committing theft or robbery, an offence punishable under S. 401, I. P. C. Of these fourteen accused, four have been acquitted. The remaining, accused, were sentenced each to two years' rigorous imprisonment. Of these ten accused convicted, five are here appealing. They are accused 3, 7, 8, 12 and 13.

Most of the accused are Ambalagars, a community connected with the Kallars and Maravars. Accused 1 to 3 are Pallas. The 9th accused, who has been acquitted, is a goldsmith. The eighth accused is a Brahmin. The main argument with regard to the eighth is that there is very little evidence of association with the gang apart from the evidence of P. W. 1, the approver. The reason for this seems to be this that this accused contributed more towards the organisaction of the gang than to the execution of the individual acts of theft or robbery. P. W. 1 says that this accused did not actually take part in any of the thefts or robberies. However, there is a not inconsiderable body of other evidence against this accused. He made a confession proving that he was connected with this gang in a particular theft and certain articles of clothing were recovered from him in consequence of this confession. It has been argued that this confession is not admissible; but as it led to the discovery of articles which were the subject of theft, it is clearly admissible under S. 27 of the Evidence Act. Two other witnesses, P. Ws. 3 and 5, have spoken to his association with other members of the gang; and P. Ws. 11, 12, and 28 have also spoken against him. As a Brahmin and a Mirasdar, his habitual association with persons of evil repute is itself a matter of suspicion, and he has given no satisfactory explanation of his association with such persons. In fact, he denies it. Although the learned judge did not marshal the evidence against this accused, it is not likely that the Jury overlooked the particulars of evidence against this accused. A slight misdirection was given to the Jury as far as this accused is concerned with regard to a theft which had taken place about a fortnight or so before the recovery of property from him. in

which the learned judge said that this recovery indicated that this accused had taken part in the theft. The learned Judge did not indicate the alternative that the accused might have been a receiver of stolen property: but in view of the accused's own confession I do not think that this misdirection is a serious one. I agree that the learned Judge should have concluded his charge with a summary of the evidence against each accused; so that the jury should be quite clear in their minds what evidence there was against each of them. A considerable body of evidence was let in and there was a danger that the jury should decide by general impressions rather than by a memory of the actual facts proved in the evidence. However, as far as this particular accused is concerned, there is no reason to think that even if the charge has not been subject to this defect the jury would have acquitted him.

The third, seventh, twelfth, and thirteenth accused made no confessions of their guilt as so many others of the accused did, nor was any property recovered from their possession. The evidence of P. W. 1 was corroborated, therefore, only by the evidence of certain witnesses who speak to these persons associating at shandies or toddy shops. In the case of the third accused, four persons have spoken to his association with other members of the gang on various occasions, three persons have spoken to the association of the twelfth accused, and two witnesses each to the presence of the seventh and thirteenth accused in assemblies of members of the gang. There is no fixed rule that a judge should summarise separately the evidence against each accused and the learned Sessions Judge here has analysed the evidence of each witness fairly: but clearly he should have done so. It is difficult to know what effect such a marshalling of evidence would have had on the minds of the jury; but if it had been pointed out how weak the evidence was against the seventh, twelfth and thirteenth accused, they might well have been found to be not guilty. The evidence of the two witnesses who speak against the seventh and thirteenth accused is rather vague. The evidence against the twelfth accused is the same as that against the seventh and thirteenth accused, except for the addition of the evidence of P. W, 4, which, the learned judge told the jury, was unworthy of acceptance. Ordinarily, if an omission of this sort takes place, one would remit the case for a fresh trial; but as the evidence against these three accused is so slight, I do not think it is in the interests of justice to subject them to a fresh trial.

I therefore allow the appeals of the seventh, twelfth, and thirteenth accused, set aside their convictions, and cancel their bail bonds. The convictions and sentences of the other accused are affirmed and their appeals dismissed.

N.T.R

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Cr. App. No. 557 of 1940

January, 21, 1941

HORWILL, J.

Bhumireddi VENKATA REDDI & others,
v.
EMPEROR

Cr. P. C. (V of 1898), *S.* 223 — *Rioting—Charge—Penal Code, Ss.* 34 & 149.

In cases of rioting it is usual to charge the accused individually also for the acts that they are said to have committed. If that is not done the accused may have cause for argument that when the main charge of rioting and acting in concert in pursuance of a common intention has failed, they ought not to be convicted for the particular acts committed by them.

In this case the accused were charged with rioting and murder by virtue of Ss. 34 *and* 149, *I. P. C. The evidence that was given in the Sessions Court was also given in the Court of the Committing Magistrate.*

Held, *that the accused knew exactly what acts they were said to have done and that as there had been no miscarriage of justice on account of this omission, the conviction should not be set aside on that ground.*

Appeal against the order of the court of session of the Cuddapah division in C. C. No. 16 of 1940.

V. T. Rangaswamy Ayyangar & K. Srinivasa Rao, for Applts.

K. Venkataraghavachari, for Crown.

JUDGMENT

The four appellants and seven others were charged in the lower court with rioting and murder by virtue of the provisions of both Ss. 34 and 149, I. P. C. The learned Sessions Judge referred to the tendency in cases of faction for one party to implicate all the leaders of the opposite faction: and he came to the conclusion that a case had been made out against the four appellants, but that he was not quite satisfied that there were any more than the four persons present. The charges of rioting and of constructive murder therefore failed. He came to the conclusion that the nature of the injuries to the deceased person were not such as to indicate beyond all doubt that those who attacked him intended to kill him. He found appellants 1 and 2 (accused 1 and 4) guilty under S. 324 I. P. C. and appellants 3 and 4 (accused 7 and 8) guilty under S. 325 I.P.C., both these convictions presumably being by virtue of S. 34, I. P. C.

The prosecution story, as told by P. W. 1, the wife of the deceased, and others, is to the effect that the eleven accused jumped over the wall of the threshing floor and fell on her husband crying 'Kobali.'' She then narrated the parts that the various accused played. Her husband was severely injured and he was taken to the hospital, where he died 24 hours later of the injuries that he had received at the hands of those who attacked him.

The learned Sessions Judge divides the evidence into three classes, (1) the evidence of the eye witnesses, P. Ws. 1 to 3, 5, and 6: (2) the evidence of P. Ws. 7, 8 and 9, who were said to have been told by the deceased immediately after the attack of what had been done to him and (3) the evidence of the dying statement made by the deceased to which his thumb impression had been affixed. With regard to the first class of evidence he found that P. W. 1 was probably the only eye witness. The second class of evidence he rejected on the ground that Ex. F, the dying declartion, showed that he was unconscious until he reached the hospital; and if so, he could not have told P. Ws. 7, 8 and 9 of the offence. He accepted Ex. F as being a correct statement given by the deceased an hour or two after he was admitted into the hospital; and he used Ex. F as a measure by which to test the evidence of P. W. 1. In so far as Ex. F and the deposition of P. W. 1 were in agreement, he accepted P. W. 1's story. That is why he has convicted the four appellants and acquitted all the others.

With regard to Ex. F, the learned Sessions Judge had to decide between the evidence of the doctor, P. W. 4, and the Sub Inspector P. W. 17, for P. W. 4 stated that the deceased was unconscious throughout the period he was detained in the hospital and did not recover consciousness before his death. This, of course, cannot be completely true even according to P. W. 4's evidence; for this witness has sent a report to the police, Ex. B, on the morning after the offence to the effect that the deceased had received injuries at the hands of the first and the second accused and others. This he gathered from something that was said by the deceased himself, although he deposes that he could not understand what was being said by the deceased and that those who had gathered round him told him what the deceased was saying. It is clear from the evidence of P. W. 4 that he did not realise fully the serious nature of the injuries caused and that he had no suspicion that the deceased was going to die. The Sub Inspector, in a part of his evidence that rings very true, spoke to the surprise with which he learnt of the death of the deceased; because he had met P. W. 4 at the club and had been told by him that the dislocated joints of the deceased had been set and that the man was doing well. Certain interpolations in red ink in the accident register Ex. D are, as the learned Sessions Judge says, not the sort of entries one would make in an accident register: and it is clear that these en-

tries were made for the purpose of affording some sort of explanation for his apparently negligent conduct. I think therefore that the learned Sessions Judge was right in holding that the deceased was not unconscious when first admitted to the hospital. That does not however mean that the deceased was in a condition to make the rather full statement found in Ex. F. He must have been in severe pain and it is possible that he was not in a condition to make such a full report. Moreover, the thumb impression affixed to the statement has been proved by an officer of the Finger Print Bureau not to be that of the deceased. There is therefore some ground for suspecting that Ex. F was not the statement of the deceased. A statement was however recorded—as some remarks of P. W. 4 would show—and Ex. F was almost certainly not fabricated for the purpose of affording evidence against the accused: for it was not taken to any official, but produced two days later at the village when the sub inspector went there to investigate.

If the other findings of the learned Sessions Judge are correct, almost the only evidence against the appellants is the oral evidence of P.W. 1. The learned Sessions Judge was however impressed with the evidence of P. W. 1, and after going through her deposition one cannot but feel that she was an eye witness and has given an approximately correct account of what she saw. She stood cross examination very well and there was nothing that she said which in any way suggests that she was concealing or adding to the truth. The learned Sessions Judge has accepted her evidence however only where it agrees with Ex. F and has consequently acquitted seven of the accused.

As P. W. 1's evidence is almost uncorroborated, it is necessary to view it with caution. The first appellant is apparently the leader of his faction: but against him there is the corroborating evidence afforded by Ex. B, in which the deceased gave his name to the doctor as being one of his assailants. I cannot believe that the deceased was then in a fit state to fabricate evidence. He must have given that statement soon after he recovered consciousness—if we are going to rule out the evidence of his telling the other witnesses of the attack on account of his statement that he remained unconscious until he reached the hospital. The part given to the 7th and 8th accused (the third and the fourth appellants here) was probably not considered very important by the persons of the deceased's faction, because they were said to have been holding his legs and twisting them. Though actually the result of their acts probably contributed to the death of the deceased more than any other injury did, it is not likely that the members of this faction thought so; because there were no external injuries corresponding to the acts done. I can see no reason why the 7th and 8th accused should have been said by P. W. 1 to have done this if in fact it was some other persons who were responsible for the twisting of the legs of the deceased. There remains the fourth accused, who is said to have had a battle-axe and to have caused the injury on the back of the right leg from which most of the haemorrhage took place. This wound was actually not very serious; but the villagers must have been impressed by the fact that this was a gaping incised wound caused by an axe. The father of the fourth accused had been engaged in a bitter and recent litigation with the deceased and it is to him that the injury that was thought the most serious was attributed. There were two dangerous weapons possessed by those who attacked the deceased and the more lethal of the two was said to have been held by the fourth accused. I think, therefore, in the absence of corroborative evidence and in view of the bitterness which must have been felt towards the fourth accused and his father, the evidence against this accused should be viewed with more caution than against the others and that he should be given the benefit of the doubt.

Mr. V. T. Rangaswami Ayyangar has pointed out that the learned Sessions Judge has departed from a salutary practice in

cases of this kind and has charged the accused only for rioting and for murder by virtue of ss. 149 and 34, I. P. C. It is usual in such cases to charge the accused individually also for the acts that they are said to have committed. This draws the attention of the accused in particular to the acts which they are said to have committed. If that is not done, the accused may have cause for argument that when the main charge of rioting and acting in concert in pursuance of a common intention has failed, they ought not to be convicted for the particular acts committed by them. In this particular case I do not think that there has been any miscarriage of justice on account of this omission; for the evidence that was given in the sessions court was also given in the court of the Committing Magistrate; and so the accused knew exactly what acts they were said to have done. I am not therefore disposed to set aside the convictions on this ground; but would point out to the learned Sessions Judge the desirability of adhering to the practice current in most other courts of charging the accused individually for the acts specifically done by them as well as jointly for the offence for which they might be liable by virtue of ss. 149, and 34 I.P.C.

In the result, the conviction of the fourth accused is set aside and his bail bond cancelled. The learned Sessions Judge has viewed the case against the other appellants very leniently, and I find no reason to interfere with the sentences imposed on these three appellants or to doubt the correctness of their convictions. The convictions and sentences on these three appellants are therefore affirmed and their appeal dismissed.

N.T.R.

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A. A. O. No. 240 of 1940
February 10, 1941.
MOCKETT, J.

S. KUPPUSWAMI CHETTIAR
v.
SUBBARAYA CHETTIAR

Cr. P, C. (V. of 1898), S. 476—Sanction to prosecute — Considerations — Appeal — Notice.

In sanctioning a prosecution the court should consider not only whether there is a prima facie *case, but also as to whether it is in the public interest it should be instituted: but it should say very little regarding the merits and nothing about the expected result.*

It is not correct to state as a matter of law that mere long delay in making a complaint stands in the way of prosecuting a person.

In an appeal against an order of a district judge under S. 476, Cr. P. C., notice should go to the Public Prosecutor rather than to the Government Pleader.

Appeals against the order of the district court of North Arcot dated 25—3—1940 and made in I. A. No. 6 of 1940 (I. A. No. 702 of 1937 in I. P. No. 36 of 1934 on the file of the court of the subordinate judge of Vellore).

K. S. Jayarama Ayyar & G. Gopalaswami, for Applt.

K. V. Ramachandra Iyer, for Respt.

Public Prosecutor (V.L. Ethiarj), for Crown.

JUDGMENT.

This is an appeal against the order of the learned district judge of North Arcot directing that a complaint should be laid in the court of the magistrate having jurisdiction charging the petitioner with offences under Ss. 199, 209, 210 and 420, I. P. C. I think it is clear from the decision in *Muniswami Mudaliar* v. *Rajaratnam Pillai*, [1] that in sanctioning a prosecution the court should consider not only whether there is a *prima facie* case but also whether it is, in the words of Coutts Trotter, J. in the above case, "against the public interest to allow criminal proceedings to be instituted" but which I respectfully suggest must also imply the consideration as to

1. [1922] M.W.N. 594: 45 Mad. 928

whether it is in the public interests they should be instituted. In this case the offence on which these complaints are based was committed between the 30th January 1937 and 7th April 1937. On the 9th April 1937 the money said to have been obtained on April 7th by means of the offences alleged was returned voluntarily by the petitioner to the Official Receiver. April 8 was a holiday. No action was taken by the present respondent until June when an application is said to have been made for papers. Not until the 10th September, 1937 was an application made to prosecute. The case has had a chequered career. It came before a subordinate judge who in considering the matter stated that "the respondent stands self-condemned. He admittedly made a false claim before the Official Receiver and obtained payment". The Subordinate Judge considered that the long delay in making the complaint by the respondent stood in the way of prosecuting the present appellant. If he considered this was a matter of law, he was wrong. If he considered that it was an ingredient assisting him to arrive at his decision, he might have considered the element of delay with all the other circumstances. The District Judge set aside that order and directed the matter should be reconsidered on grounds, with which I am not wholly in agreement. They amount to this: Who is the worse offender—the petitioner in this case or the respondent? I. A. No. 702 of 1937 was heard on the 25th March 1940 and a long judgment was delivered by the District Judge, the result of which in my opinion is most unfortunate. He should have considered whether there should be a prosecution on the lines laid down in *Munusami Mudaliar* v. *Rajaratnam Pillai* [1] and said very little regarding the merits and nothing about the expected result. He described the man whose prosecution he was directing as "a self-confessed criminal who on his own admission is responsible for contriving and perpetrating a serious fraud on the court." This entirely prejudices the case. He then goes on to use the following words, "I have no doubt that that matter"—referring to a contention of the petitioner—"will be taken into consideration by the trial court in awarding punishment in the case." This presumes a conviction. He does not consider at all the long delay in this case in making the complaint. In my view this case has reached a stage when it is not definitely in the public interest that a prosecution should proceed. This is a good example of the maxim now so well known that not only should justice be done but should be seem to be done and I consider, for me to allow a case to proceed in which the District Judge has referred to a man to be prosecuted as a self-confessed criminal who had contrived and perpetrated a serious fraud on the court, would not be in accordance with the last of the two conditions in the maxim. There might be such a case but this does not seem to me to be that case. It does seem unquestioned that the petitioner admitted an offence against the court which he endeavoured to put right at the earliest possible moment. That was in 1937. On the face of it, it does not seem to be necessarily a very grave case but it has been magnified and embellished with extravagant epithets in a manner wholly out of proportion to its importance and I consider that now it is not in the public interests that the prosecution should proceed in this atmosphere of pre-trial comment. I shall therefore allow the appeal and the lower court is directed to withdraw the complaint. There will be no order with regard to costs.

In this case the question has arisen as to whether notice should go to the Public Prosecutor or Government Pleader in appeals such as this. The decision in *Kumaravel* v. *Shanmuga* [2] makes it clear that this is a civil matter from the point of view of whether the C. P. C. applies. I think however that owing to the nature of the proceedings it is desirable that notice should go to the Public Prosecutor rather than to the Government Pleader as he is the appropriate Law Officer to

2. [1940] M.W.N. 472(2): I.L.R. Mad.762 F.B.

deal with questions relating to prosecutions, e. g., perjury and similar offences. I may add that I think this case has shown how necessary it is that notice should go to a Law Officer who can bring an impartial eye to bear upon this question and thereby assist the court. The respondent has pressed most strongly for this prosecution to continue although I do not suggest that his learned counsel went further than he properly could. His instructions are the instructions of the lay client. But the Public Prosecutor suggests the view which I have now held, namely, that having regard to all the circumstances and especially the manner in which this case was dealt with in the lower court, it is not in the interests of justice but rather contrary to them that this prosecution should proceed.

N.T.R. — *Appeal allowed.*

Cr. R. C. No. 635 of 1940
Cr. R. P. No. 596 of 1940
November 29, 1940

LAKSHMANA RAO, J.

The President, Pakkam Panchayat Board
v.
Munuswami Reddi

Local Boards Act (Mad. Act XIV of 1920*),* Ss. 123 & 207—*Notice to remove manure pit—Objection petition—If further notice necessary for conviction under.*

A notice was served on the accused on 25—12—1939 *directing him to remove certain manure and to close a pit within six days. On* 2—1—1940 *the accused presented an objection petition contending that the manure pit was not insanitary. The objection petition was considered by the Panchayat Board on* 15—4—40 *and it was held that the manure pit was really insanitary. In a prosecution under Ss.* 123 *and* 207,

Held, *that the accused was guilty and an acquittal of the accused on the ground that the result of his objection petition was not communicated to him was unsustainable.*

The facts appear from the following extracts from the order of the lower court:

"This is a complaint by the President, Panchayat Board, Pakkam, against Munusami Reddi, under ss. 123 and 207 of the Madras Local Boards Act, 1920, for storing manure in a pit causing danger to the health and offensive to the neighbourhood and failure to remove the manure and to close the pit in compliance with the notice lawfully issued under the provisions of the Act.

* * * *

"Ex. E is a copy of the resolution of the Panchayat Board, dated 21—12—39 deciding to issue notice to the accused and to take further action against him in case of failure to do so and Ex. F is the duplicate of the notice served on the accused on 25—12—39 directing him to remove the manure and to close the pit within six days. On 2—1—1940 the accused presented an objection petition, Ex. G, contending that the existing manure pit was not insanitary and criticising the administration of the panchayat. Though this objection was not received within the time allowed, the panchayat board considered the objection and passed a resolution on 15—1—1940 deciding that the manure pit was really insanitary and sanctioning the prosecution of the accused (Ex. H.). The complaint was thereupon filed by the President on 20—3—40.

* * * *

"In prosecutions of this nature all that the court has to consider is whether the accused was given the notice fixing a definite time, whether the accused failed to carry out the directions in the notice and whether in case of objection the panchayat board considered the objection and approved the prosecution. All these have been duly complied with. On the contention of the defence that the manure pit is not insanitary, I accept the opinion of the Health Inspector, who inspected it (Ex. B-1), that it is highly insanitary, though the defence counsel argued that the sanitary inspector should have been examined as a witness.

"But no evidence has been put forward by the prosecution to show that the result of his objection petition was ever communicated to the accused so as to enable him to comply with the requisition. Though the Act does not specifically provide for such an intimation, I think that in all fairness, the accused is entitled to know the result of his objection petition and also a further opportunity to comply with the notice. So far as the original notice is concerned it has been complied with by presenting the objection petition. After the objection has been considered and decided against the accused a further notice should have been issued to the accused fixing a fresh period for compliance. As no such further opportunity has been given to the accused, I hold that the accused is not guilty under ss. 123 and 207 of the Madras Local Boards Act and therefore acquit him under s. 245 (1), Cr. P. C."

Against this order the present revision was filed by the Panchayat Board.

Petition under Ss. 435 & 439 Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the stationary second class magistrate of Tiruvellore dated 27—6—1940 and passed in C. C. No. 422 of 1940.

V. Ramaswamy Iyer, for Petr.
Public Prosecutor, (*V. L. Ethiraj*) for Crown
Respondent not represented.

ORDER.

The sub magistrate has in effect found the accused guilty of the offence under S. 207 of the Madras Local Boards Act and the acquittal of the accused on the ground that the result of his objection petition was not communicated to him is unsustainable. The acquittal is therefore set aside and there will be a retrial of the accused in accordance with law.

N.T.R. —

Cr. App. No. 457 of 1940
October 25, 1940
LAKSHMANA RAO, J.

PUBLIC PROSECUTOR, MADRAS
v.
PANCHAKARLA SOORAMMA

Prevention of Adulteration Act (Mad. Act III of 1918*)*, *S.* 20 *& Rr.* 27 *&* 29*—Addition of water to milk—Offence.*

A person adding water to milk intended for sale or offers for sale milk to which any such addition has been made would be guilty under Rr. 27 *and* 29 *framed under s.* 20 *of the Madras Prevention of Adulteration Act and the fact that the milk does not fall below the standards of purity prescribed for cow's milk is immaterial.*

The Facts appear from the following extracts from the judgment of the lower court:—

"This is a case under s. 5 (1) (d) of the Madras Prevention of Adulteration Act and Rr. 27 and 29 of the Madras Prevention of Adulteration Rules filed by the Commissioner, Cocanada Municipality, against P. Sooramma for having hawked and sold milk which was adulterated with the addition of water to an extent of 14 per cent on 15—10—39 at about 8-45 A. M. in Ramaraopet, Cocanada.

"The vakil for the accused asks for an acquittal on the ground that the milk in question was not specified to be buffalo's or cow's milk and has therefore to be treated and dealt with as cow's milk having regard to the provision in R. 22 of the Madras Prevention of Adulteration Rules and that the milk in question did not fall below the standards of purity prescribed for a cow's milk in Rr. 16 and 17 of the Madras Prevention of Adulteration Rules. There is some force in his argument. Neither the occurrence report nor the history of the charge-sheet in this case makes mention of the milk as buffalo's milk or cow's milk. In the charge explained to her, it was therefore only stated to her that she sold adulterated milk, without specifying whether it was cow's or buffalo's milk. P. W. 1 states in his evid-

ence that the accused said that it was a mixture of cow's and buffalo's milk and in the receipt, Ex. A. given by the accused, it was described as a mixture of cow's and buffalo's milk, but it is not clear as to why the milk was not described as that in the charge sheet itself. It would appear from the Government Analyst's Certificate, Ex. B. that it was not definitely clear to him that it was buffalo's milk. This is clear from the words 'probably buffalo's milk' appearing in it. In Ex. B. the Government Analyst states that as a result of the investigation made by him of the sample by the Croyscopic method, it was seen that the sample was prepared by the dilution of milk containing 10 per cent milk solids other than milk fat. But it does not follow from this that the milk that was diluted was buffalo's milk and not cow's milk; and in fact, the Government Analyst does not seem to be very certain about it, as would be seen from the words 'Milk (probably buffalo's milk).' In view of these circumstances the milk in question has to be treated and dealt with as cow's milk having regard to the provisions of R. 22 of the Madras Prevention of Adulteration Rules. According to Ex. B. the sample contained 5. 7 per cent of milk fat and 8. 6 per cent milk solids other than milk fat. Genuine cow's milk would contain at least 3 per cent of milk fat and 8.5 per cent of milk solids other than milk fat and genuine buffalo's milk would contain at least 4.5 per cent of milk fat and at least 9 per cent of milk solids other than milk fat, as laid down in G. O. No. 1867, P. H. dated 1—9—1932. It would be seen that the samples in question did not fall short of the standards of purity fixed for cow's milk and that it fell short of standards of purity fixed for buffalo's milk only in respect of 4 per cent of milk solids other than milk fat. The milk has to be treated and dealt with as cow's milk and it cannot be said that the sample was below the standards of purity prescribed for it. The case for the prosecution rests upon the certificate given by the Government Analyst, Ex. B, as regards the fact of adulteration of the milk. As seen above, the sample in question does not fall below the standards of purity prescribed for cow's milk and so no presumption lies that the milk is not genuine by reason of the abstraction of milk fat or addition of water thereto. In these circumstances it must be held that the offence under r. 27 of the Madras Prevention of Adulteration Rules, has not been proved.

"I therefore, find that the accused is not guilty of the offence under s. 5 (1) (d) of the Madras Prevention of Adulteration Act and rr. 27 and 29 of the Madras Prevention of Adulteration Rules and acquit her under s. 245 (1), Cr. P. C. M. O. 1, shall be destroyed after the appeal suit is over."

The present appeal was filed by the Provincial Government on the grounds:

"(1) The learned magistrate erred in acquitting the accused on the ground that the same did not fall below the standard of purity prescribed for cow's milk.

(2) The learned magistrate has entirely misunderstood G. O. No. 1867 P. H. dated 1—9—1932, which prescribed the standard of purity with reference to Ss. 16 and 17 of the Prevention of Adulteration of Food Act.

(3) The learned magistrate ought to have held that where there was definite evidence of adulteration by adding water, the test laid down in the Government Order would not apply."

Appeal under S. 417. Cr. P. C. 1898, against the acquittal of the aforesaid respondent (accused) by the stationary sub magistrate of Cocanada dated 16—2—1940 in C. C. No. 1514 of 1939 on his file.

Public Prosecutor, (*V.L. Ethiraj*) for Crown. Respondent not represented.

JUDGMENT

This is an appeal by the Provincial Government against the acquittal of the respondent of an offence under Rr. 27 and 29 framed under s. 20 of the Madras Prevention of Adulteration Act.

The respondent, a golla woman, was selling milk near the railway station and the sanitary inspector purchased half a seer of milk for sample. The milk was found to contain 14 per cent of water and R. 27 of the rules framed under s. 20 of

the Madras Prevention of Adulteration Act provides that no person shall add any water to milk intended for sale or offer for sale milk to which any such addition has been made. R. 29 makes a breach of that rule punishable with fine and the purity of the milk is immaterial. The respondent would therefore be guilty under Rr. 27 and 29 and her acquittal on the ground that the milk was not otherwise adulterated is unsustainable. The appeal is therefore allowed and the order of acquittal is set aside. The respondent is convicted under Rr. 27 and 29 framed under section 20 of the Madras Prevention of Adultetration Act and sentenced to pay a fine of Rs. 10 with simple imprisonment for one week in default,

N.T.R — *Appeal allowed.*

Cr. App. No. 639 of 1939.

April 10, 1940.

LAKSHMANA RAO, J.

B. SRINIVASA RAO

v.

EMPEROR.

Defence of India Rules, Rr. 34, *cl.* 6. *& r.* 38, *Cl.* 5—*Speech exhorting audience to desist from enlisting in the army and assisting the prosecution of the war—Prejudicial act —Offence—Sentence.*

Where the appellant delivered two speeches at two public meetings held on two different dates and exhorted the audience in both the speeches to desist from enlisting in the army or assist in the prosecution of the war in any maner,

Held, *the 'speeches were intended to prejudice the recruiting of persons for service in the army and influence the conduct or attitude of the public in a manner likely to be prejudical to the efficient prosecution of the war and were thus prejudicial acts as defined in cls.* (*d*) *and* (*k*) *of r.* 34 (6) *of the Defence of India Rules and that the appellant was guilty under r.* 38 *cl.* 5 *of the Defence of India Rules.*

Held further, *that the sentence of rigorous imprisonment for two years in respect of each speech, the sentences to run concurrently, cannot be said to be excessive in the absence of any undertaking not to repeat the offence.*

Appeal against the order of the court of the Chief Presidency Magistrate, Egmore, Madras, dated 3-11-39 and passed in C. C. No. 1781 of 1939.

S. Suryaprakasam, for Applt.

C. V. Nagaraja Sastri, for Crown.

JUDGMENT.

The appellant was the Secretary of the Madras Socialist Party and he delivered two speeches at two public meetings held on 29th September and 15th October last. He was charged under Rs. 38, Cl. 5 of the Defence of India Rules, and besides alleging some distortions in the transcriptions, he contended that the speeches were not "prejudicial acts" as defined in Rs. 34, Cl. 6. The Magistrate held otherwise and convicted and sentenced him to rigorous imprisonment for two years in respect of each speech, directing the sentences to run concurrently.

The accuracy of the transcriptions of the speeches which were taken down in shorthand by trained sub inspectors was not seriously disputed, and apart from other objectionable matters, the appellant exhorted the audience in both the speeches to desist from enlisting in the army or assisting the prosecution of the war in any manner. He had been warned by the Commissioner of Police against carrying on such propaganda and the speeches were intended to prejudice the recruiting of persons for services in the army and influence the conduct or attitude of the public in a manner likely to be prejudicial to the efficient prosecution of the war. They were thus 'prejudicial acts' as defined in Sub-Cls. (d) and (k) of R. 34, Cl. (6) and the conviction under Rs. 38, Cl. 5 is correct. It is therefore confirmed and in the absence of any undertaking not to repeat the offence the sentence cannot be said to be excessive. The sentence too is confirmed and the appeal is dismissed.

N.T.R. *Appeal dismissed.*

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CR. R. C. No. 1048 OF 1940
CR. R. P. No. 997 OF 1940

February 6, 1941

LAKSHMANA RAO, J.

S. S. PATTABI RAMA IYER
v.
EMPEROR

Cr. P. C. (V of 1898). S. 243 — Admission of offence by accused under misapprehension—Retrial.

Where the accused admitted the offence with which he was charged under a misapprehension, he is entitled to a retrial.

The facts of the case were as follows:

The accused was a dealer in cotton and had taken out a license under s. 5 of the Madras General Sales Tax Act of 1939 for the year ending 31st March 1940. About August 19, 1940 he applied for license and the license was granted to him with effect from 19th August 1940. He was called upon by the Assistant Commercial Tax Officer why he should not be dealt with under s. 15 (a) of the General Sales Tax Act for not having submitted a return. The officer not being satisfied with the explanation of the accused caused a prosecution to be instituted against the accused under s. 15 (a) of the General Sales Tax Act for not having sent the return within 20th June 1940. On the date of hearing the accused was found guilty on his own admission and convicted of the offence under r. 6 (10) of the Turnover and Assessment Rules punishable under R. 32 of the General Sales Tax Rules 1939 and was sentenced to pay a fine of Rs. 25 and in default simple imprisonment for one month.

The present revision was filed against the conviction on the following grounds:

"The court below erred in law in thinking that R. 6 (10) of the Madras General Sales Tax Rules 1939 applied to the case of a person whose license had expired on the 31st of March 1940 and who held no license on the 20th of June 1940.

"The court below failed to note that the license held by the petitioner having expired on 31st March 1940, that he had made an application for a fresh license only in July 1940, and that a license was granted to him only on 19—8—40 with effect from 19—8—1940. As such the petitioner was not a licensee on 20th June 1940 and that no return under r. 6 (10) was due to be submitted by him.

"The court below having on 28—8—40 altered the charge under S. 15 (a) of the Madras General Sales Tax Act into one under R. 6 (10) of the Madras General Sales Tax Rules 1939 ought to have granted the petitioner a day's adjournment prayed for by him to enable him to consider the effect of the alteration and to make his representations."

An affidavit was also filed in support of the revision petition in which it was alleged; "On 28—8—1940 when the case was taken up, the magistrate thought that s. 15 (a) would not apply to me and in consultation with the Assistanc Commercial Tax Officer changed s. 15 (a) of the Act into R. 6 (10) read with R. 32 of the Madras General Sales Act Rules.

"I was taken by surprise and was not familiar with the rules. I requested the court for a day's time at least to enable me to study the rules and to conduct the defence. On the court refusing to grant this request, I admitted the offence under a misapprehension"

Petition under ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the 1st class Magistrate Gobichettipalayam dated 28—8—40 in Crime Register No. 32 of of 1940.

S. S. Ramachandra Iyer, for Petr.

Public Prosecutor (v. L. Ethiraj), for Crown.

ORDER.

The petitioner appears to have admitted the offence under a misapprehension and his request for a retrial cannot be resisted. The conviction is therefore set aside and there will be a retrial in accordance with law.

N.T.R. *Conviction set aside.*

Cr. R. C. No. 1084 of 1940
Cr. R. P. No. 1029 of 1940
February 10, 1941

HORWILL. J.

PARAMBATH KANARAN & others
v.
C. R. VASUDEVAN

Cr. P. C. (V of 1898). S. 552—Application under by alleged husband — Proof of marriage — Allegations necessary in petition.

Where the respondent applied under S. 552 Cr. P. C. alleging that his wife had been taken away to Tellicherry against her wishes and detained by her parents, the petitioners, there and the petitioners denied that there had been any marriage,

Held, (1) *that the petitioners ought not to be required to answer the charge, unless the magistrate had something more substantial before him than the respondent's petition as evidence that a marriage had taken place, for unless the Magistrate was satisfied that the marriage had taken place, the respondent had no right to ask the magistrate to have the girl brought back to Madras.*

(2) *In the absence of the allegation in the petition that the girl was under 16 years of age, no order under S. 552, Cr. P. C. could be passed.*

Petition under Ss. 435 & 439 Cr. P. C., 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the court of Presidency Magistrates, Egmore, Madras, dated 1—11—1940 and made in M. P. No. 946 of 1940.

K. K. Sreedharan, for Petrs.
R. Karunakara Menon, for Respt.
Crown Prosector (P. Govinda Menon,) for Crown.

ORDER

The Respondent put in an application in the Court of the Chief Presidency Magistrate purporting to be under S. 552, Criminal Procedure Code, alleging that he was lawfully married to the 3rd petitioner here on the 22nd September 1940, that the nuptials took place, and that on the following day, the 23rd day of September 1940, the parents, the 1st and 2nd petitioners here, took away the 3rd petitioner against her wishes to her home and detained her there with the intention of getting her married to somebody else.

The Magistrate issued a notice under section 552 Criminal Procedure Code to produce the girl. On the date to which the case had been adjourned an Advocate appeared on behalf of the petitioners and represented that it would be a great hardship to bring the girl all the way from Tellicherry in North Malabar to Madras to answer to a petition that could not in any case be granted because the girl was more than 16 years of age and no offence had been committed within the jurisdiction of the Magistrate. The Magistrate overruled that objection and ordered a non-bailable warrant to issue. Upon the representation of the advocate appearing for the petitioners here that it was illegal to have the girl arrested and that, in any case, it would be a very harsh method of procuring her attendance in court, the order was cancelled after the advocate gave an undertaking that he would produce the girl on the adjourned date. In the meanwhile, he got a stay order from this Court. The question that arises is whether the order of the learned Chief Presidency Magistrate calls for any interference from this Court.

There can be no doubt that it would be very hard on the petioners if without strong grounds they were required to come from Tellicherry in North Malabar to Madras for the purpose of this petition unless the Magistrate was satisfied that their attendance was necessary. The petition was a very short one; and the only statements on which the learned Magistrate could act were that there was a legal marriage on the 22nd September 1940 and that on the 23rd September 1940 the girl was taken away. When he issued his second order he had heard the story of the other side, which was that they had come to Madras to answer an advertisment in which the respondent was seeking for a bride and that, finding that the respondent would not make a suitable husband, they took the girl back again. With these two stories in front of him I think the learned Chief Presidency Magistrate should have

required from the respondent some further evidence that a lawfnl marriage had taken place; for unless he was satisfied that the marriage had taken place, the respondent clearly had no right to ask the Magistrate to have the girl brought back to Madras.

The learned Crown Prosecutor has pointed out that under section 4 (Cl. 3) of the Madras Marumakkattayam Act, notice of every marriage shall be given to some person appointed under the Act to register such marriages. If the learned Magistrate had been satisfied by a copy of such registration or otherwise that a marriage had really taken place, then the petitioners might have no cause for complaint in being required to come from Tellicherry in North Malabar to Madras to answer the charge; but they ought not to be required to do so unless the magistrate had something more substantial before him than the respondent's petition as evidence that marriage had take place.

Moreover, one would have expected that together with an application under section 552, Criminal Procedure Code, there would have been a complaint under the Indian Penal Code of the offence of abduction.

The learned advocate for the petitioners has further pointed out that the offence, if any, that was committed in Madras was abduction, and there can be no abduction unless force or deceit is used. There is nothing in the petition which was sufficient to satisfy the learned Magistrate that force or deceit had been used in taking away the girl from Madras. Moreover, an order under section 552, Criminal Procedure Code can only be passed if the girl is under 16 years of age, which is not alleged in the petition.

It will follow from what has been said above that the order of the learned Chief Presidency Magistrate has to be set aside. One course that would be open to this Court would be to direct the Magistrate to enquire further into the matter and satisfy himself that an order under section 552, Criminal Procedure Code should issue; but as the dispute between the respondent and the petitioners seems to be one that could be decided much more satisfactory in a civil court than by a summary order of a Magistrate, I do not think it is in the interest of justice that the present proceedings should be continued.

The petition is therefore allowed and the proceedings before the Chief Presidency Magistrate quashed. The respondent may pursue his remedy in a civil court if so advised.

N.T.R. *Petition allowed.*

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Cr. R. C. No. 273 of 1941
Cr. R. P. No. 259 of 1941

March 24, 1941.

SIR LIONEL LEACH, C. J. & SOMAYYA, J.

SYED GAFFAR SAHIB
v.
EMPEROR

Prohibition Act (Mad. Act X of 1937), S. 4 (1) (a)—Prohibition of possession of intoxicating liquor — Not ultra vires — Government of India Act, 1935, Sch. VII, List II Cl. 31 & List I, Cl. 19.

In prohibiting the possession of intoxicating liquor manufactured within the province, the Madras Prohibition Act is not ultra vires *the Provincial Legislature.*

The Provincial Legislature has under Cl. 31 of the Provincial Legislative list in Sch. VII to the Government of India Act power to prohibit the possession of intoxicating liquor and a person found in unlawful possession of such liquor is guilty of an office under S. 4 (1) (a), Prohibition Act.

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Tirupattur dated 16—12—1940 and passed in C. A. No. 70 of 1940 preferred against the judgment of the court of the stationary sub magistrate of Gudiyatham dated 9—11—1940 and passed in C. C. No. 1307 of 1940.

T. S. Venkataraman & G. Venkatarama Sastri, for Petr.

ORDER
(SIR LIONEL LEACH, C. J.)

The petitioner has been convicted under S. 4 (1) (a) of the Madras Prohibition Act

of being in unlawful possession of a quantity of arrack and sentenced to pay a fine of Rs. 100 and in default to undergo rigorous imprisonment for three months. The court is asked to quash the conviction and sentence in the exercise of its powers of revision on the ground that in prohibiting the possession of intoxicating liquor the Madras Prohibition Act is *ultra vires* the Provincial Legislature, but this contention obviously cannot be accepted so far as this case is concerned.

Cl. 31 of the Provincial Legislative List in the seventh schedule to the Government of India Act 1935 gives the Provincial Legislature full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors. S. 4 (1) (a) of the Prohibition Act prohibits *inter alia* the possession of intoxicating liquors. It is said that the Act is *ultra vires* the Provincial Legislature because cl. 19 of the Federal Legislative List places in the Central Legislature the power to legislate with regard to "import and export across frontiers as defined by the Federal Government." In this case there is no question of any import or export. The case is merely concerned with the possession of arrack manufactured in the Madras Presidency. The Provincial Legislature having power to prohibit the possession of arrack and the petitioner having been found in possession of such liquor, the conviction was a lawful one.

The petition will be dismissed, and as we do not consider that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, we do not feel called upon to give a certificate under s. 205. It may be added that no certificate has been asked for.

N.T.R. *Petition dismissed*

Cr. R. C. No. 1117 of 1940
Cr. R. P. No. 1061 of 1940

February 11, 1941.

LAKSHMANA RAO, J.

C. R. SESHADRI IYENGAR
v.
EMPEROR.

Cr. P. C. (V. of 1898), S. 476—Case taken on file after investigation by Police—Subsequent discharge—If complaint under S. 211 can be made.

Where a case was taken on file after investigation by the police under S. 202, Cr. P. C., the subsequent discharge of the accused would not justify the making of a complaint under S. 211, I.P.C. against the complainant.

Facts: The parties were brothers. The petitioner filed a complaint with the police and a complaint before the Stationary Sub Magistrate, Kovvur, against his brothers under Ss. 380 and 451 I. P. C. The case was taken on file after investigation by the police under S. 202, Cr. P. C. The sub inspector of police who investigated the complaint reported that there was a *prima facie* case. But the accused were discharged after enquiry. Thereupon the person complained against moved the stationary sub magistrate to prosecute the petitioner under Ss. 193 and 211, I.P.C. for making a false and injurious complaint against him. The petition was enquired into by the stationary sub magistrate who refused to file a complaint. On appeal the sub divisional magistrate ordered the prosecution of the petitioner under S. 211, I.P.C. and directed the filing of the necessary complaint. The present revision was filed against the order directing the filing of a complaint.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional Magistrate of Kavali dated 21st October 1940 and passed in C. A. No. 23 of 1940 preferred against the judgment of the Court of the Stationary Sub Magistrate of Kovur dated 7—8—1940 and passed in M. C. No. 1 of 1940.

K. Umamaheswaran, for Petr.
A. S. Sivakaminathan, for Crown.

ORDER.

The case was taken on file after investigation by the Police under S. 202 of the Cr. P. C. and the subsequent discharge of the accused would not justify the making of a complaint under S. 211 of the I. P. C. The revision petition is therefore allowed and the complaint will be withdrawn.

N.T.R. *Petition allowed.*

Cr. R. C. No. 21 of 1941
Cr. R. P. No. 20 of 1941

February 27, 1941

LAKSHMANA RAO, J.

NATARAJA MUDALIAR & others
v.
DEVANAI AMMAL

Penal Code (XLV of 1860), *Ss.* 379 *&* 448—*Heir of deceased person removing cattle of the deceased through servants—Offence.*

Where one D died on the 20th of February and the first petitioner who was his heir, along with his servants, removed certain cattle on the 28th February as belonging to D, and the concubine of D filed a complaint against the petitioners.

Held, *that the first petitioner was not guilty under S.* 379, *nor were the other petitioners, his servants, guilty under S.* 448, *I.P.C.*

FACTS: The respondent preferred a complaint against the petitioner and four others alleging that the accused on 28—2—40 entered into her house and committed theft of her buffalos, cows and some other properties. Respondent had been living as concubine of one D, for about 7 or 8 years till his death on 20—2—40. A charge under S. 379, I. P. C. was framed against accused 1 and a charge under S. 448 was framed against accused 3 and 4. Removal of the property by accused 1 with the aid of the other accused was admitted. The trial court in the course of its judgment said; "The question that is raised is whether this removal of the properties which are said to belong to the deceased by his legal successor in title constitutes an offence under S. 379 I. P. C.................. Whoever might have been the actual owner, there is no doubt that the cows, buffalos and other articles were with P. W. 1 (respondent) and that she has been enjoying the benefits out of them. The removal now in question therefore caused wrongful loss to P. W. 1 and wrongful gain to accused I....... ....Accused I knew that P. W. 1 laid claim to the property and that the matter had to be settled in a civil court, (as he put it in his written statement) and yet he has taken the law into his own hands to dispossess P. W. 1 of the M. Os. I therefore hold that the removal by accused I was with dishonest intention and that his act amounts to theft."

On appeal the sub divisional magistrate said: "In view of the claim made by accused 1, the only point to be decided was, whether he removed the M. Os. under a *bona fide* claim of ownership. If the court found that he was *bona fide* then the accused should be acquitted. Otherwise they come within the ambit of s. 379........... The lower court was wrong in thinking that possession was the criterion and that removal of property from another's possession constituted theft.......... I will have to examine the facts of the case to see if the properties concerned in this case belong to P. W. 1 or to late D and in the latter case whether accused I was justified in removing them.............. It is therefore clear that M. Os. 9 to 11 were the exclusive properties of the late D and the accused I was entitled to them as the next legal heir. The action of the appellant in having removed these M. Os. does not amount to an offence since such removal was based on a genuine title to the properties.............. As for the other items............. I hold that M. Os. 1 to 8 exclusively belong to P. W. 1 and that accused 1 had no justification to lay claim to them. He should have been aware of this fact of ownership and therefore his action in having removed them cannot be said to be *bona fide*. Therefore I am of opinion that he was rightly convicted of removing M. Os. 1 to 8.......... I uphold the conviction and confirm the sentence.

Against that order the present revision was filed.

Petition under ss. 435 & 439 of the Cr.P.C. 1898, praying the High Court to revise the judgment and sentence of the Court of the Sub-Divisional Magistrate of Tiruvallur dated 28—10—1940 and passed in C. A. No. 56 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tiruvallur in C. C. No. 564 of 1940.

M. Natesan, for Petrs.
K. Venkataraghavachari, for Crown.

ORDER

The first petitioner is the heir of one Duraiswami Mudaliar who died on 20th February last and the second and third petitioners are his servants. The complainant was the concubine of Duraiswami Mudaliar and the cattle were removed on 28th February as belonging to Duraiswami Mudaliar. The conviction of the petitioners under ss. 379 and 448, I. P. C. is therefore set aside and the fines if levied will be refunded.

N.T.R. *Conviction set aside.*

Cr. App. No. 55 of 1941
Cr. R. C. No. 52 of 1941
Cr. R. P. No. 51 of 1941
March 12, 1941

LAKSHMANA RAO, J.

PUBLIC PROSECUTOR
v.
NAGAPPAN SERVAI

Penal Code (XLV of 1860), s. 397 — 'User' meaning of.

S. 397, I. P. C. does not require the user to be against the person robbed and where the accused uses a knife to frighten persons coming to the rescue of the person robbed, he would be guilty under s. 392, I. P. C. read with s. 397, I. P. C.

THE FACTS appear from the following extracts from the charge to the Jury and the judgment of the Sessions Court:

"20. P. Ws. 2 to 4 used to start every day in the early hours in the morning from their village taking the greens as head loads and sell them in Nattarasankottai just about or after sunrise. As usual they were going on the date of occurrence i.e., 24—6—40, and on their way the 1st accused caught hold of P. W. 2 by her tuft by his left hand and laid his right hand on her Thumbu Tali. She resisted the snatching away of the Tali by catching hold of the right hand of the 1st accused by both her hands and cried out for help. Her mother (P. W. 3) and brother (P. W. 4) who were going in advance turned round and after placing their headloads on the ground came near P. W. 2 and asked the 1st accused why he was removing P. W. 2's tali. The 1st accused then brandished the knife M. O. 1 taking it from his waist. They became afraid and stepped back. Then the 1st accused is said to have stabbed P. W. 2 with the same knife just below her right breast, somewhere about the 7th rib. In the meanwhile, the 2nd accused is said to have turned up and snatched away the Tali from the neck of P. W. 2. After snatching the Tali, the accused are said to have run away.

The 1st accused was charged under S. 372 read with S. 397, I.P.C. and the 2nd accused under S. 397 I.P.C. It is a serious offence, Before a person can be convicted of that offence there must be clear and definite evidence. In this case the evidence is that a simple hurt was caused with M. O. 1. It is for you to consider whether such hurt was deliberately caused or it was a mere accident in using the knife M. O. 1 which he wanted to brandish against P. Ws. 3 and 4."

"The jury by an unanimous verdict find the 1st accused guilty of an offence punishable under S. 392, I. P. C, but not under S. 397 I. P. C. They find the 2nd accused guilty under S. 394 I. P, C.

"I accept the unanimous verdict of the jury.

"The jury are of opinion that the wound referred to in Ex. A might have been caused to P, W. 2 by an accident and not with deliberation. They are also of opinion that the 1st accused used the knife M. O. 1 to prevent the mother and brother of P. W. 2 coming to her assistance and rescuing her from his grip. The 2nd accused was assisting the 1st accused in all

his acts. He is therefore liable for punishment under S. 394, I. P, C.

Taking all these circumstances into consideration, I convict and sentence the 1st accused to rigorous imprisonment for a period of two years under S. 392 read with S 75 I. P. C. and the 2nd accused to rigorous imprisonment for a period of 18 months under S. 394, I. P. C."

Against that order the local Government preferred a criminal revision for enhancement of sentence and an appeal on the following grounds:

"1. The charge to the jury is vitiated by misdirections as regards law relating to S. 397. I. P. C.

2. The learned judge has not properly explained to the jury the meaning of the terms "whoever uses a deadly weapon" occurring in S. 397 I. P. C.

3. The charge in paragraph 20 indicate that the learned judge considered that brandishing of knife is not sufficient to constitute "user" and hurt should be caused.

4. The direction in paragraph 20 has misled the jury."

Appeal under S. 417 of the Cr. P. C. 1898, against the order of acquittal of the aforesaid respondent (1st accused) of the offence under S. 397. I. P. C. by the Assistant Sessions Judge of the Court of Session (Assistant) of the Ramnad Division at Devakotta dated 15—10—1940 and made in Sessions Case No. 103 of 1943, and Petition under Ss. 435 and 439 of the Cr. P. C., 1898 to revise the order of the Court of the Assistant Sessions Judge of the Court of Session, Ramnad Division at Devakottai, dated 15—10—1940 and made in S. C. No. 103 of 1940 and to enhance the sentence passed on the accused in the said case.

A. S. Sivakaminathan, for Crown.

N. T. Raghunathan, for accused.

JUDGMENT.

The appeal and revision case arise out of Sessions Case No. 103 of 1940 in which two persons were tried by the Assistant Sessions Judge of Ramnad with a jury, the first accused for an offence under S. 392 read with S. 397 I. P. C. and the second accused under S. 394 I. P. C. The Jury unanimously found the first accused guilty under S. 392 I. P. C. and the second accused under S. 394 I. P. C. and accepting the verdict the Assistant Sessions Judge sentenced the first accused to rigorous imprisonment for 2 years and the second accused to rigorous imprisonment for 18 months. The Crown appeals against the acquittal of the first accused of the offence under s. 397, I. P. C. and the revision case has been preferred by the Public Prosecutor for enhancement of sentence.

The case is simple and as found by the Jury, P. W. 2 was robbed of her jewels on her way to Nattarasankottai along with her mother P. W. 3 and brother P. W. 4. M. O. No. 1 the knife was used by the first accused to frighten P. Ws. 3 and 4, and it struck and caused hurt to P. W. 2. The second accused then removed the jewels and both the accused were caught soon after, the first accused with M. O. No. 1, the knife with human blood on it and the second accused with M. Os. 2 to 5, the stolen jewels. The knife M. O. 1 is a deadly weapon and it was used at the time of committing the robbery. S. 397, I. P. C. does not require the user to be against the person robbed and the guilt of the first accused under s. 392, I.P.C. read with s. 397, I.P.C. admits of no doubt. The appeal is therefore allowed and the first accused is convicted under s. 392 read with 397, I.P.C. and sentenced to the minimum punishment of rigorous imprisonment for seven years.

The revision case becomes unnecessary as regards the first accused and the sentence of the second accused who is a first offender cannot be said to be inadequate. The revision petition is therefore dismissed.

N.T.R. *Appeal allowed*

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Cr. R. C. No. 1033 of 1939

Cr. R. P. No. 970 of 1939

April 4, 1940

LAKSHMANA RAO, J.

V. K. R. St. KASI VISWANADHA CHETTIAR

v.

EMPEROR

Companies Act (VII of 1913), s. 76 (1) & (2) — Managing Director not knowingly or

wilfully a party to default under—Conviction.

Though a person was a Managing Director eo nomine, *but he was not knowingly or wilfully a party to the default under S.* 76 (1), *Companies Act, he cannot be convicted under S.* 76 (2), *Companies Act.*

The facts of the case appear from the judgment of the lower court which was as follows :

"Accused 1, 2, 3 and 5 are directors of the Oriental Investment Trust Ltd. Under S. 76 (1) of the Companies Act the company should have held a general body meeting for the year 1939 on or before 7—6—39. The directors, accused 2, 3 and 5, met leisurely on 16—6—39 and fixed the date of the general body meeting on 1–7–39. Meanwhile an application had been filed to wind up the company. The court ordered the winding up on 21—7—39. No general body meeting was held.

"They are charged under S. 76 (2) of the Act.

"Accused 2 was one of the managing agents. All three (Accused 2, 3 and 5) were residents of Devakottah. Under the articles, Accused 2 and 4 (the latter's whereabouts are not known) as managing agents had to perform all the duties of the Company. Accused 2 contends that everything had been left by him to accused 4, who had now absconded. The directors have so framed the rules that all responsibility devolves on the managing agents. And one of them, accused 2, pleads that as a matter of actual fact the absent director discharged all the functions and should be held responsible for all defaults.

"They plead that as directors they are not bound to give continuous attention to the affairs of the company. Their duties are of an intermittent nature to be performed at periodical board meetings. They were not parties to the default knowingly and wilfully. The two last words connote an intentional default. Their default was only inadvertent.

"Holding a general body meeting once a year is an elementary and a fundamental duty of the Directors. It is the only occasion when the affairs of the company come up before the shareholders, who have financed the company and who constitute it. A failure to do it or neglect to perform it connotes recklessness and irresponsibility. Accused 2, 3 and 5 knew the date of the last general body meeting to be 7—3—38 ; vide Ex. E, to which they have appended their signatures. As directors who had definite responsibilities under the Act and who have undertaken both to the general public and to the shareholders to perform them, it was their duty to know the provisions of s. 76 (1) of the Act, under which the next general meeting could not be held later than 7—6—39. They meet on 16—6—39 and cavalierly fix the date of the meeting on 1—7—39. This exhibits a reckless carelessness in the sense of not caring whether their act or omission is or is not a breach of duty. The default was certainly wilful in this sense. I must hold accused 2, 3 and 5 were parties to the default knowingly and wilfully. I must find all three guilty under s. 76 (2), Companies Act."

The present petition was by the 2nd accused against the conviction.

Petition under ss. 435 & 439, Cr. P. C., 1898 praying the High Court to revise the judgment of the 2nd Presidency Magistrate of the Court of the Presidency Magistrates, George Town, Madras in C. C. No. 1884 of 1939.

C. Narasimhachari & A. M. Krishnaswami Iyengar, for Petr.

C. D. Venkataramanan, for Crown.

ORDER

The petitioner was one of the Managing Directors *eo nomine* and the evidence does not warrant the conclusion that he was knowingly and wilfully a party to the default under s. 76 (1) of the Indian Companies Act. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

N.T.R. — *Conviction set aside.*

Cr. R. C. No. 988 of 1940
Cr. R. P. No. 941 of 1940
January 31, 1941
LAKSHMANA RAO, J.

T. KANNIAH NAIDU
v.
RAJAMMAL

Cr. P. C. (V of 1898), s. 488—Major, if can claim maintenance.

S. 488, Cr. P. C. does not limit the right of maintenance to minors and the age of the child is immaterial.

The facts appear from the following extracts from the judgment of the lower court:

"One Rajammal of Vengathur filed a petition under s. 488, Cr. P. C. claiming maintenance for two of her illegitimate children born of one T. Kanniah Naidu of the same village.

* * *

"Respondent admitted that the children were born to him but stated that the girl was a major, that petitioner has been keeping her at home, refusing many offers of marriage and that the boy is fit to earn his own livelihood.

* * *

"The age of the girl and boy may be about 19 and 15 respectively. The girl is sickly. Petitioner contended that she was not married because she has been sickly. The boy is a minor. It is too much to say that he can earn his livelihood. He is entitled to maintenance. The girl being sickly is also entitled to maintenance for some time to come.

* * *

"Respondent shall pay a sum of Rs. 10 (ten only) for both the children till the boy attains majority."

The revision was filed *inter alia* on the ground that 'the order in favour of the girl who was aged 19 years and who was a major and was not a 'child' was illegal.

Petition under ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the Sub-Divisional 1st Class Magistrate of Tiruvellore, Chingleput District, dated 22—10—1940 and passed in M. C. No. 35 of 1940.

A. S. Nataraja Iyer, for Petr.
T. K. Ramaswamy Iyengar, for Respt.
Public Prosecutor, (*V. L. Ethiraj*) for Crown.

ORDER

The girl is unable to maintain herself and S. 488 Cr. P. C. does not limit the right of maintenance to minors. The age of the girl is therefore immaterial and the revision petition is dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 1057 of 1940
Cr. R. P. No. 1006 of 1940
February 4, 1941
LAKSHAMANA RAO J.

MARIMUTHU KAVANDAN
v.
EMPEROR

Penal Code (XLV of 1860), S. 411—Production of stolen articles from the house by the wife—Conviction of husband.

Where the only circumstance proved against the petitioner was that his wife produced the stolen properties from the house where both ware living,

Held, this would not warrant the conviction of the petitioner under S. 411, I. P. C.

THE FACTS appear from the following extracts from the Judgment of the lower appellate court:.

"There was theft of M. Os. II to X, brass vessels and a harmonium from the temple of Mallapuram on 20—5—40. P. W. 1, the temple priest, complained to the village headman. P. W. 4, and he reported to the police. P. W. 7, the headconstable, who was on special duty, learnt from P. W. 5 and others that the stolen properties were in the house of the appellant and went there along with the village headman of that village (P. W. 6) at 4-30 P. M. on 10—6—40. On being questioned, the wife of the appellant (P. W. 4) produced the said articles (M. Os. II to VIII) in the presence of the village headman and two others who have attested the Mahazar—Ex. C., saying that they had been sent to her by her husband through P. W. 5.

"That there was a theft in the said temple and that M. Os. II to VIII recovered from the house of the appellant were stolen articles admit of no doubt. The question is how far the appellant is responsible for the possession of the said stolen articles.

"Therefore the prosecution version that the appellant's wife produced the said articles from their house stands unrebutted. Though the appellant's wife was in actual possession of the articles at the time of the seizure, the circumstances clearly warrant the inference that she could not have been in possession of them independently of the husband and that the possession of the articles must be deemed really to be that of the husband. It is not the case of the appellant that the wife was in independent possession of them. There is also the evidence of the head constable that the appellant was absconding. The circumstance is not without its own significance. In conclusion I agree with the finding of the sub magistrate, consider the case proved and confirm the conviction. There is nothing particularly aggravating about the offence. The sentence is reduced to three months".

Against the said conviction the present petition was filed on the grounds, *inter alia*, that there was no proof of possession of the M. Os. by the accused and that the evidence was not sufficient to justify the conviction.

Petition under ss. 435 & 439 of the Cr.P.C. 1898 praying the High Court to revise the judgment of the Court of the Sub Divisional 1st Class Magistrate of Coimbatore dated 16—11—1940 and passed in C. A. No. 118 of 1940 preferred against the judgment of the Court of the Stationary Sub Magistrate of Udumalpet in C. C. No. 1450 of 1940.

K. S. Jayarama Iyer & G. Gopalaswami, for Petr.

A. S. Sivakaminathan, for Crown.

ORDER

The only circumstance proved against the petitioner is that his wife produced the stolen properties from the house where both were living and this would not warrant the conviction of the petitioner under s. 411, I. P. C. The conviction and sentence of the petitioner are therefore set aside and his bail bonds will be cancelled.

N.T.R. — *Conviction set aside.*

Cr. App. No. 756 of 1940.

December 17, 1940

LAKSHMANA RAO, J.

THOTABALIJA PUCHALA SOMANNA & another

v.

EMPEROR

Penal Code (XLV *of* 1860) *S.* 411—*Conviction under—Sentence.*

Where two accused were convicted under S. 411, *I. P. C. and the* 1*st accused was sentenced to imprisonment for two years and the second accused to imprisonment for three years as he admitted to be a registered member of a criminal tribe.*

Held, *the fact that the second accused was a member of a criminal tribe was no ground for differentiation of sentence for the offence under S.* 411. *I. P. C.*

FACTS: The two accused were charged under Ss. 457 and 380 I.P. C. and in the alternative under S. 411 I.P.C. The jury returned an unanimous verdict of guilty against both the accused under S. 411, I. P. C. Accepting the verdict of the jury the judge pronounced the following Judgment:

"I convict the accused under S. 411 I. P. C. The 2nd accused is a registered member of a Criminal Tribe, which fact he admits. I sentence the 1st accused to undergo rigorous imprisonment for a period of two years, and the 2nd accused to undergo rigorous imprisonment for a period of three years, under S. 411 I. P. C."

Against the conviction the appellants filed the present jail appeal.

Appeal against the order of the court of sessions of the Kurnool division in C. C. No. 33 of 1940.

Accused not represented.

Public Prosecutor, (V.L. Ethiraj) for Crown.

JUDGMENT

The appellants have been convicted under S. 411, I.P.C. and sentenced, the first appellant to rigorous imprisonment for 2 years and the second appellant to rigorous imprisonment for 3 years.

There was house-breaking by night and theft in P. W. I's building on the night of 27th February and stolen properties were recovered on the information of each of the appellants from the place shown by

him on 1st March. So the appellants were charged in the alternative under Ss. 457 and 380 I.P.C. or 411, I.P.C. and they denied the alleged recovery. The trial was by jury and the verdict was unanimous. There was no misdirection and on the evidence the jury could reasonably have convicted the appellents under S. 411 I. P. C. There is therefore no ground for interference with the conviction and the sentence of the first appellant cannot be said to be excessive. That the second appellant is a member of the criminal tribe is no ground for differentiation of sentence for an offence under S. 411 I. P. C. and his sentence is reduced to rigorous imprisonment for two years. Otherwise the appeal is dismissed.

N. T. R.

Cr. R. C. No. 240 of 1940.
Cr. R. P. No. 230 of 1940.

October 29, 1940

LAKSHMANA RAO, J.

Thoongavadan alias CHINNAMA NAICKEN & others
v.
PERUMAL GOUNDAN & others

Cr. P. C. (V *of* 1898), *S.* 147—*Applicability —Direction that can be given under.*

Where the counter petitioners put up a bund thereby obstructing the free flow of tank water, causing submersion of petitioner's lands and petitioners applied for an order under S. 147 *and the sub divisional magistrate finding it expedient to take action under S.* 147 *ordered the counter petitioners not to retain the bund or any obstruction to the flow of water of the tank which would cause submersion of and damage to the crops of the petitioners,*

Held, *(1) that S.* 147 *Cr. P. C. was applicable to the facts of the case;*

(2) *that it was open to the sub divisional magistrate to direct the counter petitioners to remove the dam put up by them, but the further direction that they shall not cause any obstruction to the flow of water which would cause submersion of and damage to the crops of the petitioners was beyond the scope of S.* 147 *Cr. P. C.*

THE FACTS appear from the following extracts from the Judgment of the lower court;

"Perumal Goundan and seven others have put in a petition against Chinnama Naicken and seven others (Counter petitioners) for an order under s. 147, Cr. P. C., for removing the dam which the latter are said to have put on the surplus weir of the tank called '*Kulathupil*' in Palappatti village, thereby causing obstruction to the free flow of the water. They stated that because of this obstruction by the counter petitioners their lands which are on the western and northern side of the tank had been submerged, causing heavy loss to their crops. The petitioners also stated that when they asked the couner petitioners to remove the bund they threatened to beat and murder them and added that there was likelihood of a breach of peace. The police to whom the petition was sent for enquiry also reported that unless action was taken against the counter petitioners, there was sure to be a breach of peace.

"A preliminary order under s. 147 Cr. P. C. was served on both the parties. They filed their written statements. The counter petitioners contended that the bund referred to by the petitioners was not a new one and that it had been in existence since time immemorial. The petitioners examined six witnesses on their behalf, while the counter petitioners examined five.

"Ex. A is the plan of the tank in question. According to the petitioners, the irrigation sluice was originally on the south eastern side of the tank, and the surplus weir was on the north of it. They complain that the counter petitioners during the last rains closed the original irrigation sluice and have converted the surplus weir into an irrigation sluice by not only narrowing its width, but also by raising the sides to a height of about 4 feet. This is said to have been done to increase the holding capacity of the tank.

"In the circumstances stated above, I have no hesitation in believing that the bund or structure, which the counter petitioners have put up at the place which the petitioners call the surplus weir, and the counter petitioners their irrgation sluice, is a new one and that because of that bund, the free flow of the tank had been obstructed causing the submersion of and damage to the petitioner's crops."

Against that order the present revision was filed *inter alia* on the grounds:

"The court below ought to have found that there is no question of right to use the water between the petitioners and the counter petitioners in this case and ought to have found that S. 147, Cr. P. C. has no application to the facts of the case at all.

"The court below erred in granting the mandatory injnction of the kind of order passed in this case and ought to have found that even a civil court would not have granted such an injunction."

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Namakkal dated 25—2—1940 and passed in M. C. No. 56 of 1939.

V. T. Rangaswami Ayyangar, T. R. Ramachandran & V. Balaramiah, for Petr.

K. S. Jayarama Ayyar & S. Arunachalam, for 1st Respt.

A. S. Sivakaminathan, for Crown.

ORDER

There is no substance in the contention that S. 147, Cr. P. C. is not applicable and and it was open to the sub divisional magistrate to direct the petitioners to remove the dam put up by them on the surplus weir of the tank. But the further direction that they shall not cause any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the opposite party is beyond the scope of S. 147, Cr. P. C. and to that extent the order of the sub-divisional magistrate is vacated. Otherwise this petition is dismissed.

N.T.R. —

Cr. Apps. Nos. 474, 647 & 672 of 1940
Cr. R. C. No. 800 of 1940
Cr. R. P. No. 754 of 1940

January 31, 1941

HORWILL, J.

R. TITUS
v.
EMPEROR

Evidence Act (I of 1872), S. 21—Admissions by accused — Admissibility—Cr. P. C., S. 562—Object and scope of.

Where in the course of an enquiry by a Magistrate into the conduct of certain police officers, the police officers made statements to the magistrate and the police officers were later charged under Ss. 348 and 330 I. P. C.

Held, *that the statements were admissible under* S. 21, *Evidence Act,*

Ss. 21 to 27 of the Evidence Act do not suggest that statements that would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused may have made many admissions which do not implicate himself in any criminal charges, but these would be admissible under S. 21 Evidence Act.

S. 562, Cr. P. C. is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime, and to help even men of mature years who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens. It was not intended that this section should be applied to experienced men of the world, who deliberately flout the law and commit offences which they know are strongly condemned by their superior officers, but which they have persisted in doing.

Appeals by the said appellants, accused 1 to 3, respectively, against the order of the Court of Session of the Cuddappah Division dated 6th July 1940 and passed in C. C. No. 12 of 1940 and petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High

Court to set aside the order under S. 562 Cr. P. C. passed in respect of accused Nos. 2 & 3 in C. C. No. 12 of 1940 by the Sessions Judge of the Cuddapah Division and to pass substantive sentences on them.

K. S. Jayarama Ayyar, G. Gopalaswami, V. V. Srinivasa Iyengar, & Kasturi Seshagiri Rao, for accused.
K. Venkataraghavachari, for Crown.

JUDGMENT.

The three appellants, who are police officers at Rayachoti, were charged in the Sessions Court of Cuddappah under Ss. 348 and 330, I. P. C. with wrongful confinement for the purpose of extorting a confession and voluntarily causing hurt for the same purpose. The appellant in C. A. 474 of 1940 was the first accused in the lower Court. He has been found guilty under both counts and sentenced to three years' rigorous imprisonment and fined for each offence. The appellant in C. A. 647 of 1940 was the second accused in the lower Court. He has been found guilty only under Ss. 323 and 342 I. P. C., because, although the learned Sessions Judge thought that he had committed some of the acts of which complaint was made, he was not satisfied that they were done for the purpose of extorting a confession. The appellant in C. A. 672 of 1940 was found guilty under S. 342, I. P. C. for the same reason. He was the third accused in the lower Court. The learned Sessions Judge was not even sure that this appellant caused any injury to any of the complainants. Both the 2nd and the 3rd accused were directed to be released on their executing bonds for good behaviour. The Crown has preferred a criminal revision case, contending that these orders were not an adequate punishment for the offences.

The prosecution story is that P. W. 18, the wife of the hotel-keeper, P. W. 19, lost a *billa* on the evening of the 7th September 1939, which she had removed from her hair only a short time before its loss was discovered. She suspected P. W. 1, a maid servant in her house, aged about 14; her younger sister P. W. 3 aged about eight; and P. W. 2, a *dhobi* woman aged about 50 years, who was in the hotel when this *billa* was lost. P. W. 19 seems to have been on very friendly terms with the local police, and the station writer promised to send two constables. One of them was the third accused. This accused came and said to P. W. 19, 'I am not a man if I do not get your *billa* back'. Then he adopted the cowdung procedure, in order to give the accused persons an opportunity of returning the *billa* without implicating themselves. Each of them was told to bring a ball of cow dung and put it in a pot, the reason for this being that if they had the *billa* they could put it in the middle of the dung and so conceal the return of the jeweal. That procedure was however unsuccessful and the search wns abandoned for the night. On the following morning P. W. 19 told the Circle Inspector P. W. 37, at about 8 a. m. of his loss. The first accused, who was the Station House Officer, was absent on that day from the station; and so the Circle Inspector told the 2nd accused, who was the Prohibition Sub Inspector of the same place, to look into the matter. The second accused at once sent P.W. 41 to fetch the three suspected persons to the station, where they were subjected to third-degree methods, being beaten in various petty ways, rapped on the knuckles, knees, elbows, etc., by this accused. At about 12–30 p. m. a search was made of P. W. 2's house and P. W. 2 was taken from the station to her house for that purpose. She was there put to certain indignities and struck by the 2nd accused. The third accused kicked her husband. Nothing being found there, P. W. 2 was taken by the third accused, under the second accused's instruction, to the house of the 1st accused where at about 2 p. m. she was locked up by the third accused. At about 4 p. m. the second accused returned to the first accused's house and beat P. W. 2. He then left instructions for P. W. 2 to be brought back to the station. Throughout this time P. Ws. 1 and 3 were detained at the station. At about 6 p. m. she was brought to the station by P. W. 40. On the way to the station they were met by the

first accused, who had just returned to Rayachoti, and from that time onwards, the second accused left the matter almost entirely in the first accussed's hands. He actually left the station at 8 p. m. but he continued to play a minor part in this drama. The first accused now began to turn his attention to P. W. 1, who had so far escaped lightly. He struck her over the knees and knuckles and threatened her in various ways. In the meanwhile, P. W. 3 had run home and P. W. 16 had to be sent to fetch her back. She came back with her parents. During this time, P. W. 1 was interrogated not only about the *billa* but even more about a *chembu* that was said to have been stolen from P. W. 19. She admitted having sold a *chembu* to one Narayana (P. W. 15), and she was taken there and the *chembu* recovered. When this *chembu* was shown to P. W. 19 he said that it did not belong to him. This questioning took place at the house of the 2nd accused at about 10 p. m., where it was intended to draw up a panchayatnama, respectable persons having been brought there for that purpose. In view, however, of P. W. 19's statement no document was written. P. W. 1 was then taken on to the house of the 1st accused, where she remained for the rest of that night. P. W. 3 was detained all night at the station; but P. W. 2 was brought to the 1st accused's house just before midnight. P. Ws. 1 and 2 remained in the 1st accused's house all that night. P. W. 1 complains that during that night she was raped; but that was the subject of a charge in another sessions case which is under appeal and will be discussed elsewhere. At cock crow, P. W. 1 was taken to the house of the 2nd accused, where she remained for some hours until her parents came and took her away. P. W. 2 was brought to the 2nd accused's house at about 8 a. m. As she was found to have blood on her saree which, P. W. 2 says, was the result of a kick in the abdomen by the 1st accused at the station, the 2nd accused told her to change her saree and she was given a fresh one. The 2nd accused told somebody there to put the saree behind the door and from there it was recovered two days later.

Although the appellants denied in the Sessious Court that the investigation proceeded on the lines spoken to by the very many prosecution witness, there can be no doubt from the abundance of evidence in this case, that the story is substantially true. In fact, the three appellants made statements to the Sub Divisional Magistrate of Cuddappah, who was deputed to enquire into their conduct; and while the three appellants denied that any beating or improper confinement had taken place, their account of the lines on which the enquiry proceeded is substantially that of the prosecution witnesses. Mr. Jayarama Ayyar has argued that these statements to the Sub Divisional Magitrate are not admissible; but I do not see why not. They do not purport to be statements recorded under S. 164 Cr. P. C., for the magistrate was then merely holding an enquiry into the conduct of these police officers and the appellants were not even under arrest. Ss. 21 to 27 of the Evidence Act do not suggest that statements that would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused may have made many admissions which do not implicate himself in any criminal charges; and these would be admissible under S. 21 of the Evidence Act. Mr. Jayarama Ayyar quotes a decision of the Privy Council in *Pakala Narayanaswami* v. *The King Emperor* [1], and argues that the Committee held the statements that are described as admissions in civil actions are confessions in criminal cases. I do not however find anything to that effect in their judgment. On the other hand, they have given an illustration of a case of an admission which would not amount to a confession. They however ruled out the statement in question, which was that the accused had slept on the night of the offence in the house of the person who was killed—not because it was either a confession or admission, but because it had to be excluded under S. 162,

1. 1939 M.W.N. 185; Cr. 17: 18 Pat 234, P.C.

Cr. P. C. as being a statement made to the police during the course of investigation.

Very many of the prosecution witnesses are constables attached to the Rayachoti station, either under the 1st accused or nnder the 2nd accused, and their evidence is criticised on the ground that they were accomplices. With this contention I quite agree. They depose as approvers. I find nothing in the evidence which suggests that the constables who assisted the appellants in the acts complained of did so unwillingly. It cannot be doubted that they thoroughly approved of everything that was being done, and supported their chiefs with relish. They were merely carrying on an ancient practice which, although rather frowned upon by the higher police officials today, has still not lost its popularity. These police witnesses saw nothing wrong in what was being done; and they have undoubtedly given evidence because they were told to do so. They knew that if they did not do so, they would be punished for the parts which they had played. That does not however mean that they have been concocting evidence against their former superior officers. That was not expected of them; and I do not think that any of them would wish to do so. In giving evidence they were governed by several considerations; they had to say something; they would wish to minimise the part that they themselves had played and, unless they had some personal grievance against the appellants, they would want to help them. Against P. Ws. 33 and 39 the first appellant says that he sent in a report to his superior officers about some infectious disease from which P. W. 33 was suffering and that he had to take action against the son of P. W. 39 for theft. I am inclined to think that there is something in the statement of the 1st accused. It seems unlikely that he would make a false statement with regard to his official duties which could be very easily contradicted, and P. W. 39 admits that his son was sentenced to one month's rigorous imprisonment for theft. Moreover, these witnesses have undoubtedly not deposed impartially as between the 1st and 2nd accused. Whereas they were discreetly ignorant of what the 2nd accused was doing at the station during the time that he was investigating and interrogating P. Ws. 1 to 3, they do not conceal in the slightest the doings of the 1st accused. It is unlikely that P. Ws. 1 to 3 were lying with regard to what the 2nd accused did and telling the truth with regard to what the 1st accused did. However, there is no reason to suppose that P. Ws. 33 and 39 have spoken falsely against the 1st accused: for their evidence is not only corrroborated by P. Ws. 1 to 3 and by one another — but on minor points by a number of other witnesses.

Another group of witnesses that have been the subject of much criticism by the one side or the other is the three doctors who examined P. Ws. 1 and 2. After a complaint was made to the Sub Magistrate at 4–30 p. m. on the 9th, which was the day on which P. Ws. 1 to 3 were released by the police, he sent P. Ws. 1 and 2 to the local Sub Assistant Surgeon (P. W. 5) to be examined. He found a contusion on the knuckles of one of the fingers of the left hand of P. W. 1 and another on the left side of the forehead. He also noted areas of tenderness on the knees, although he could see no swelling there. These injuries accord with P. W. 1's story of the injuries which she received at the hands of the 1st accused at the police station. On P. W. 2 he found three abrasions and two contusions. He has also noted that she complained of bleeding from the uterus. It is said that this witness was tampered with by the police officials at or before the date he made his examination; but I think that the entries in his accident book, which accord with the oral evidence of the witnesses make it extremely unlikely that he deliberately omitted to record any injuries which he found. As P. W. 1 had complained of rape, P. W. 5 advised her to go to the Cuddappah Headquarters hospital, where she was examined by the Lady Apothecary there, P. W. 7. Her evidence has been attacked

because she has not noted even the injuries that were found by P. W. 5; but she explains that she was merely examining P. W. 1 for signs of rape, and so did not look for contusions and abrasions on parts of the body which would not be injured even though rape had been committed. She however noted a contusion on the outer side of the left elbow. It is to be noted that this examination was two days after the examination by P. W. 5; and so the finding of this contusion was no indication that it was present on the 9th. P. W. 7 examined the vagina and the vulva of P. W. 1, but found no indication that rape had been committed. Some local persons interested in the matter, not satisfied with the reports of P. Ws. 5 and 7, got P. W. 1 examined by a private practitioner, P. W. 6. He found a small abrasion at the bottom of the spinal column with a thick black scab over it and he found the left breast considerably swollen. He has noted complaints of pain in other parts of the body, but nothing was seen by him. He found no injuries to the genitals. The evidence of this witness has been attacked by the defence as being that of a person who was paid Rs. 10 by local political busybodies for giving such a report. However, the Deputy Superintendent of Police and others have deposed that P. W. 1 had a swelling on her breast, and the certificate of P. W. 6 does not suggest that he did not honestly record what he found. He did not however examine her until the 12th evening, and there is nothing in his certificate that is inconsistent with the certificate of P. W. 5. The slight swelling and abrasions etc., noted by P. W. 5 must have disappeared before P. W. 7 examined her, and the injury to the breast might well have been caused afterwards.

It may be mentioned at this stage that the persons just referred to as being responsible for the examination of P. W. 1 by P. W. 6 have been much criticised by the defence advocates as being persons who, from purely political motives, have been trying to stir up an agitation against police officers, whom they regarded as their natural enemies. When members of the public find that poor persons are unable to bring to the notice of the authorities particulars of their own ill-treatment, it is commendable that they should help those persons to secure justice and to bring to the notice of the superior officers the high handed and tyrannous conduct of their subordinates; unless, as is here suggested, they are actuated by motives of vengeance against a class of persons whom they dislike for political reasons. There is certainly something to be said for the defence contention that the persons who interested themselves in this matter were not actuated by high motives; for they succeeded in denying to these police officers the benefit of the assistance of the Circle Inspector during the enquiry by the Sub Divisional Magistrate of Cuddapph; and it is possible that the considerable discrepancies between the various statements made by the complainants and much of their evidence is due to their being incited to exaggerate their grievances. However, when every allowance has been made for the matters criticised above, it cannot be gainsaid that a very strong case has been made out against the appellants. Their strongest attack lies undoubtedly in the early statements made by P. Ws. 1 and 2 and those acting on their behalf. At 4-30 p. m. as I have already said, P. W. 13, the father of P. W. 1 and P. W. 2, gave complaints to the Sub-Magistrate which have been marked as Exs. R and B. In Ex. R, which was drawn up by a document writer upon instructions from those who were interesting themselves in getting the appellants punished, the father of P. W. 1 gave a complaint in which a number of persons were mentioned as accused. They were P. W. 19, the 3rd appellant, and some constables whose numbers and names were not known. In the body of the complaint, however, reference is made to a beating by the Rayachoti Police Sub Inspector, which prabably meant the 1st accused, but may have meant the second. If, however, the politicians who were helping P. Ws. 1 to 3 had really been regardless of the truth and

anxious only to get the Sub Inspectors punished, one would have expected that the names of the Sub Inspectors would have been prominent in the head-lines of the complaint as the accused persons. The accused cannot argue in one breath that political agitators were responsible for the evidence against them and at the same time rely on Ex. R as showing that it is unlikely that they took part in this attack. The first appellant relies on the fact that Kondayya, the father of P. W. 2, knew not only his rank but his name, yet neither in Ex. R nor in the sworn statement, Ex. R-1, is the 1st appellant mentioned by name. In the sworn statement, in which his story is given in much greater detail, all the appellants are however mentioned, and reference is made in particular to the Town Sub Inspector, which must be the 1st accused. The context and the evidence indicates that the Sub Inspector referred to lower down is the 2nd accused. Ex. R-1 makes no mention of P. W. 3's being taken to the station; but that was probably because she was not treated very badly, and the father was most concerned about his elder daughter P. W. 1, who appeared to be very exhausted by the treatment which she had received. The complaint of P. W. 2 implicates all three accused even in the title itself; and in Ex. B she sets out the outlines of her story. Because the complaint of P. Ws. 1 and 2 contained serious allegations against police officials, the Sub Magistrate reported the matter to the Sub Divisional Magistrate at Cuddappah, who thereupon sent for P. Ws. 1 and 2; and at 3 p. m. on the 10th September he recorded complaints from P. Ws. 1 and 2, which have been marked as Exs. I and IV respectively, Ex. I is strongly relied on by the defence chiefly in connection with the charge of rape. I do not think it calls for any special mention in connection with the present case.

The evidence against the 1st accused is very strong. His beating of P. W. 1 at the station and his kicking of P. W. 2 has been well corroborated by P. Ws. 16, 33, and 39; and the object of such beating was undoubtedly to extort confessions from the suspected persons. Even the words used by the 1st accused were quoted by the witnesses; and the words as well as the deeds show the purpose for which these persons were beaten. It has been argued on behalf of all the appellants that the evidence does not disclose an offence of unlawful confinement. As the learned counsel for the appellants rightly pointed out, police officers during the investigation of a case have necessarily to call persons and keep them from going to some other place where they would prefer to be; but P. Ws. 1 to 3 were detained at one place or the other for 24 hours, which was far beyond anything that was required for investigation. In fact, as far as P. Ws. 1 to 3 were concerned there was no investigation at all. From the first they denied all knowledge of the whereabouts of the *billa*; and the only purpose for which they were detained was that they might subsequently furnish information which would lead to the recovery of the jewel. The 1st accused was therefore clearly guilty of the offences with which he was charged.

For want of corroboration, the learned Sessions Judge has rejected certain parts of the evidence against the second accused; but on the points on which there is corroboration the evidence is undoubtedly worthy of acceptance. It was this accused who kept P. Ws. 1 to 3 at the station on the morning of the 8th and told the parents of P. Ws. 1 and 3 that they must bring the meals of their daughters as they would not be allowed to leave. It was he, too, who, instructed the 3rd accused to keep P. W. 2 in the house of the 1st accused. The 3rd accused locked her in; but the subsequent conduct of the 2nd accused shows that he approved of her being locked in; for he later went and beat her there. P. W. 2's evidence is corroborated by P. W. 17, who saw the 2nd appellant beat P. W. 2 twice on the back. P. W. 20 also heard the 2nd accused questioning P. W. 2 about the *billa* and saw him strike her. He is corro-

borated by P. W. 21. The learned Sessions Judge, while believing that the 2nd appellant confined and beat P. W. 1 or P. W. 2, rather curiously came to the conclusion that the evidence did not indicate that this appellant did so for the purpose of extorting a confession. I can think of no other purpose for which the 2nd appellant beat and confined P. W. 2. It had not been proved that she committed any offence. She did nothing to irritate or annoy this appellant; and his conduct is inexplicable except on the ground that he was trying to extort from her a confession. He kept P. Ws. 1 to 3 under his control the whole of the 8th September until the 1st appellant returned to the village. However, the Crown has not appealed against the acquittal of the 2nd and 3rd accused under Ss. 348 and 330 I. P. C. and so the convictions for the lesser offences, although wrong, must stand.

The evidence with regard to the 3rd accused is less than against the other appellants; but his conduct throughout the enquiry shows that he was readily filling the part that was assigned to him by his superiors, the 1st and 2nd accused. It was he who boasted on the night of the 7th that he was not a man if he could not recover the *billa*. During the search of P. W. 2's house, although he did not beat P. W. 2, he kicked her husband for protesting against the ill-treatment of his wife by the 2nd accused; and it was he who locked up P. W. 2 in the house of the 1st appellant. However, he too has been convited only of a lesser offence.

From what has been said above, it will be evident that there is very little to choose between the 1st and the 2nd accused; yet the 1st accused has been sentenced to three years' rigorous imprisonment on two counts and ordered to pay a substantial fine, while the 2nd apellant has been released under s. 562 Cr. P. C. as if he had been some ignorant and misguided man who had been led away from the path of rectitude by some superior whom he dared not disobey. The only real difference between the two is that the 1st accused was unfortunate enough not to secure the support of his subordinates to the same extent as the 2nd accused did. While no excuse can be made for the conduct of the 1st appellant, it is important, in considering the fitting sentence to be awarded, not to lose one's sense of proportion. His whole life has been blasted as a result of the departmental enquiry and of the proceedings in the Criminal Courts which have led to his conviction on two serious charges. It must be remembered that he caused no serious injury; small swellings and abrasions which disappeared after a day or two. Yet the learned Sessions Judge has on one count awarded him the maximum punishment. In view of the fact that he has been reduced to a state of penury, a sentence of four months rigorous imprisonment and a fine of Rs. 25 on each count will be sufficient to meet the ends of justice. It is difficult to see how this appellant is going to pay a big fine after he has lost his job. The order of compensation to P. Ws. 1 and 2 will stand; but not that to P. W. 3.

S. 562 is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime and to help even men of more mature years, who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens. In such cases a term of imprisonment may have the very opposite effect to that for which it was intended. Such persons would be sufficiently punished by the shame of having committed a crime and by the mental agony and disgrace that a trial in a criminal court would involve. It was not intended that this section should be applied to experienced men of the world who deliberately flout the law and commit offences which they know are strongly condemned by their superior officers, but which they have persisted in doing in order that it might not be said of them that they have not

been able to detect a petty crime. The Criminal Revision Case is therefore allowed, and the order under s. 562 set aside. The second accused is sentenced to two months' rigorous imprisonment and fine of Rs. 20 on each count: and the 3rd accused to one month's rigorous imprisonment and a fine of Rs. 10. The sentences on the 1st and 2nd accused will run concurrently.

N.T.R. —

Cr. App. No. 878 of 1940

February 13, 1941

HORWILL, J.

MANICKAM

v.

EMPEROR

Cr. P.C. (*V of* 1898), *Ss.* 112 *&* 118, *Proviso—Notice under—Form of.*

S. 112, *Cr. P. C. requires the order served upon the accused to set forth every circumstance of the charge against him, to note the amount of the bond to be executed, the term for which it is to be in force and the number, character and class of sureties if any required. Where no such particulars are given in the order under S.* 112, *Cr.P.C. it is not lawful for a Magistrate to order the execution of a surety bond under S.* 110 *Cr. P. C.*

Appeal against the order dated 28-10-1940 of the Special Honorary Magistrate of the Court of Presidency Magistrates, Egmore, Madras, in M. P. No. 552 of 1940.

Crown Prosecutor, for Crown.

Accused not represented.

JUDGMENT

The appellant was served with a notice under S. 112, Cr. P. C., informing him that the Sub Inspector of the Crime Branch had furnished information against him alleging that he was taking precautions to conceal his presence with a view to committing an offence of which details were given below. The details set out three incidents of attempts made by the appellant to enter a certain bungalow. The notice also contained a recital that since released from jail on 1—3—1939 he was living by habitually committing thefts in bungalows. The charge was headed "King Emperor-Rex v. Manickam, S. 110 (a) Cr. P. C." Evidence was given that he had tried to enter the bungalow precincts on these three occasions. that he was a convict, and that he had no ostensible means of livelihood; and the Presidency Magistrate, after summarising the evidence, ordered him to be released on his entering into a bond in a sum of Rs. 50 with one surety for a like amount to be of good behaviour within a period of one year under s. 110, Cr. P. C.

This notice is defective in many ways. In the first place, the gravamen of the charge was that he had been lurking in the precincts of the bungalow of P. W. 1 with a view to commit theft and that he actually did take an article from that house, but dropped it upon being detected. There was no evidence with regard to his having habitually committed theft after his release from jail on 1—3—1939, as said in the charge; and the evidence of P. W. 1 suggested that he had a means of livelihood. He could therefore have been bound over under s. 109 Cr. P. C. but not under s. 110 (a) Cr. P. C. Then, again, s. 112, Cr. P. C. requires the order served upon the accused to set forth every circumstance of the charge against him, to note the amount of the bond to be executed the term for which it is to be in force, and the number, character, and class of sureties if any required. and S. 118, proviso, says. "that no person shall be ordered to give security of a nature different from, or of an amount larger than or for a period longer than that specified in the order made under s. 11." No such particulars having been given in the order made under s. 112 Cr. P. C., it was not lawful for the Magistrate to pass the order he did.

As the appellant seems to have been in jail since June last, I do not think the interests of justice require that these proceedings against the accused should be further protracted.

The order is therefore set aside and the appellant ordered to be set at liberty.

N.T.R. — *Order set aside*

R. T. No. 189 of 1940
Cr. Apps. Nos. 764 & 925 of 1940
February 6, 1941
BURN & HAPPELL, JJ.

EMPEROR
v.
KSHATRI RAM SINGH *alias* Buddaiah

Cr. P. C. (*V of* 1898), S. 162—*Identification parade held by the police—Admissibility and value.*

S. 162, *Cr. P. C. excludes any evidence about statements made by witnesses at identification parades held by the police in the course of investigation of an offence. But the fact that witnesses have identified persons at parades held by the police may be proved and that fact can only be considered important evidence against the accused if the court is satisfied that the parades were held fairly.*

Mediators' report drawn up containing a record of the proceedings at a parade held by the police is wholly inadmissible in evidence.

Trial referred by the Court of Session of the Guntur division for confirmation of the sentence of death passed upon the said prisoner on 5—10—1940 in C. C. No. 42 of 1940 and appeal by the said prisoner against the said sentence and appeal under s. 417, Cr. P. C., 1898 against the acquittal of the aforesaid respondents (accused Nos. 2 to 4) by the Sessions Judge of the Guntur division in C. C. No. 42 of 1940.

G. Gopalaswami, V. V. Radhakrishnan, V. T. Rangaswami Ayyangar & K. S. Sankararaman, for Accused.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

JUDGMENT.
[BURN, J.]

On the 15th March, 1940 a man named Abraham who belonged to Rentachitala was murdered at Gurzala. His dead body was found on the roadside next morning and the Sub-Assistant Surgeon, Gurzala, (P. W. 1) who made the postmortem examination the same day, expressed the opinion that the man had been killed partly by strangling him and partly by squeezing his testicles. There is no doubt about the fact or the manner in which Abraham was done to death and the case is certainly one of murder.

In S. C. No. 42 of 1940 four men were put on their trial before the learned sessions judge of Guntur for the murder of Abraham. The learned sessions judge agreeing with all the assessors found the first accused alone guilty and sentenced him to death and acquitted the other three. C.A. No. 764 is the appeal of the first accused. C. A. 925 is an appeal preferred by the learned Public Prosecutor on behalf of the Provincial Government against the acquittal of the other three.

The principal evidence on the side of the prosecution was given by three women, Sayamma, Akkamma and Kottamma (P. Ws. 2, 3 and 4). It was in their house that Abraham was murdered and they said that they were eye witnesses of the murder. They alleged that Abraham was asleep on a cot in a room inside their house when he was attacked by the four accused. Another man they said came along with these four accused and drove the women into a room opening out of the room in which the murder was done. The first accused, they said, caught hold of Abraham by the hands, the third accused put his hands round Abraham's neck, the fourth accused sat on Abraham's chest and the second accused sat upon his legs and squeezed his testicles. The learned sessions judge and the assessors believed this evidence as far as the first accused was concerned. The learned sessions judge pointed out that the women were not in themselves reliable witnesses. Their conduct was, he thought, hardly the conduct of innocent females and he would not have accepted their evidence against the first accused but for additional circumstances appearing against him. On the 21st March the first accused made a statement under S. 164, Cr. P. C. to the taluk magistrate, Gurzala. Ex. C. is his statement and in that he admits that he was present when Abraham was murdered, but he says that the murder was committed by the second, third and fourth accused assisted by the fifth man mentioned by P. Ws. 2, 3 and 4. The first accused alleged that he himself was only a frightened spectator of the murder like P. Ws. 2, 3 and 4. Learned

counsel for the first accused has urged this view of the case upon us. It cannot however be accepted because there is another very important item of evidence against the first accused. This is connected with a watch (M. O. 2) and a fountain pen (M. O. 3) belonging to the murdered man. These were recovered by the police from one Guruvayya (P. W. 19) who was keeping Kottamma (P. W. 4). They had been given to him on the evening of the 15th March by Kottamma. Now all the eye-witnesses (P. Ws. 2, 3 and 4) say that as soon as these things were taken from the dead bady of Abraham they were offered by the first accused to Akkamma (P. W. 3) and that when she refused to receive them they were given to Kottamma (P. W. 4). The statement of the first accused himself agrees with this evidence up to a point. The first accused alleges that it was the fourth accused who demanded that Akkamma (P. W. 3) should take possession of Abraham's fountain pen, watch and money purse and he says that Akkamma took those things. There is therefore no possibility of doubting the fact that the fountain pen and the watch were taken from Abraham's body immediately after he died and there is no reason for doubting the evidence of P. Ws. 2, 3 and 4 when they say that it was the first accused who handed these articles to Kottamma (P. W. 4). The learned sessions judge was therefore right and the assessors were right in believing the evidence of P. Ws. 2, 3 and 4 as against the first accused. He has been rightly convicted of the murder of Abraham and there is no question of the propriety of the sentence. We confirm the conviction of the first accused for murder and the sentence of death and dismiss the appeal.

With regard to the second, third and fourth accused, we find ourselves in agreement with the learned sessions judge when he says that the case against them stands on a different footing. It rests entirely upon the evidence of P. Ws. 2, 3 and 4 and they, as the learned sessions judge has said, are not witnesses whose testimony can be readily accepted. The learned Public Prosecutor relies very strongly upon the fact that these three women identified the second, third and fourth accused at parades held by the police subsequent to the arrest of these men. On the 17th March the third and fourth accused had been arrested and they are said to have been identified at Rentachintala by P. Ws. 3 and 4. The second accused was not arrested till a fortnight later and on the 30th March he is said to have been identified by the same three women at Gurzala. P. W. 2 is said to have identified accused 3 and 4 at a parade held at Gurzala on the 17th March. Now since these identification parades were held by the police in the course of investigation of the murder it is clear that s. 162, Cr. P. C. excludes any evidence about the statements made by the witnesses at the identification parades. The fact that witnesses have identified persons at parades held by the police may be proved (vide *Gurusami Thevan* v. *Emperor* [1]) but that fact can only be considered important evidence against the accused if the court is satisfied that the parades have been held fairly. Now in this case as the learned Sessions Judge has rightly observed there is no detailed evidence given regarding the manner in which the identification parades were held. The evidence about them is extremely meagre. The evidence about the parades held on the 17th March is contained in statements made by the Circle Inspector (P. W. 27). He says "on 17th March, 1940 I went to Rentachintala. I held identification parades at Rentachintala. P. Ws. 3 and 4 identified accused 3 and 4 as persons who had come to their house on 15th March 1940. The mediator's report is Ex. M. Thereafter I arrested accused 3 and 4. Then I came to Gurzala. There at a parade P. W. 2 identified accused 3 and 4 as amongst the men who had come to their house on 15th March 1940. The report then drawn up is Ex. K. I examined all the witnesses and then laid the charge sheet". The Inspector says nothing about the parade held on the

1. [1936] M.W.N. 177 Cr. 25.

30th March, but the sub inspector (P. W. 28) says "P. Ws. 2, 3 and 4 identified accused 2 as one of the assailants of Abraham." The mediators' report drawn up then is Ex. L containing the record of the proceedings at the parade held at Gurzala on the 30th March. The village munsif of Gurzala corroborates these police officers with regard to the parades. It will thus be seen that there is no evidence that the suspected men were kept out of the sight of the witnesses before the parade was held. There is no evidence that the witnesses were prevented from communicating with each other while the parade was being arranged and in these circumstances we must agree with the learned sessions judge that the evidence of identification does not sufficiently strengthen the testimony of these women. It need hardly be said that the mediators' reports (Exs. K L and M) are wholly inadmissible in evidence.

There is no other corroboration of the evidence given by P. Ws. 2, 3 and 4 against accused 2, 3 and 4 and since we agree with the learned sessions judge that it would be unsafe to rely upon these women uncorroboroted, it follows that the acquittal of accused 2, 3, and 4 must be upheld and the appeal of the Provincial Government dismissed. The bail bonds of the accused 2, 3, and 4 will be cancelled.

N.T.R. —

Cr. R. C. No. 1118 of 1940
Case Ref. No. 48 of 1940

March 25, 1941

LAKSHMANA RAO, J.

OYYAPPA KONE

v.

CHIDAMBARAM CHETTIAR President, Vallalapatti Panchayat Court, Melur Taluk

Cr. P. C. (*V of* 1898), *S.* 195 (1) (*a*)—*'Public servant concerned', meaning of.*

Where a party in a suit before a village panchayat court filed a petition for transfer before the district munsif and in that petition made certain allegations against the president of the village panchayat Court,

Held, *the public servant concerned within the meaning of S.* 195 (1) (*a*), *Cr. P. C., who is entitled to file a complaint under S.* 182, *I.P.C. in respect of those allegations is the district munsif and not the president of the village panchayat court.*

Held further, *a complaint of the district munsif was necessary for a prosecution for an offence under S.* 193, *I.P.C.*

THE FACTS of the case were as follows: A party in a suit before the village panchayat court filed a petition for transfer before the district munsif and in that petition made certain allegations against the president of the village panchayat court. The president of the village panchayat court filed a complaint under S. 182, I. P. C. against him on account of these allegations. The accused filed a petition before the magistrate praying that the complaint might be dismissed on the ground that the president of the village panchayat court was not the proper person to file it, as the allegations that formed the subject matter of the complaint were made before the district munsif, and the president of the village panchayat court was only an aggrieved person. It was also objected that the case fell not within S. 182, I. P. C. but under S. 193, I. P. C., for which also a complaint by the court of the district munsif was necessary. The magistrate in rejecting the petition passed the following order:

"The offence falls under S. 182, I.P.C. and not under S. 193, I. P. C. as contended. S. 195 (1) (a) Cr. P. C. lays down that the public servant concerned should make a complaint under S. 182, I. P. C. The public servant concerned is the President of the panchayat court. The petition is therefore rejected." Against that a revision petition was filed to the sessions judge who held that under Ss. 195 and 476 Cr. P. C. the court in which the allegations were made was the proper person to file a complaint and recommended under S. 438, Cr. P. C. to

the High Court that the proceedings before the magistrate be quashed.

Case referred for the orders of the High Court, under S. 438, Cr.P.C. by the sessions judge of Madura division in his letter, dated 9—12—1940 in Cr.R.P.No. 10 of 1940 on his file.

Public Prosecutor (*V.L. Ethiraj*) for Crown.
Complainant not represented.

ORDER

The information was not given to the complainant or any public servant subordinate to him and an offence under S. 182 I. P. C. cannot be taken cognisance of except on the complaint in writing of the public servant concerned or some other public servant to whom he is subordinate. A complaint of the district munsif would be necessary for a prosecution for an offence under S. 193 I. P. C. and the proceedings cannot be sustained. The reference is therefore accepted, and the proceedings are quashed.

N.T.R. *Reference accepted*

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Cr. R. C. No. 181 of 1941
Case Ref. No. 8 of 1941
March 25, 1941
LAKSHMANA RAO, J.

SHEIKH MASTAN SAHIB
v.
EMPEROR

Cr. P. C. (*V of* 1898), *Ss.* 348 & 349—*Criminal Rules of Pratice & Orders, r.* 97—*Trial of old offender—Magistrate being of opinion that accused should receive a more severe punishment than he was competent to inflict—Procedure.*

Where a sub magistrate found the accused guilty under S. 411, *I. P. C. and being of opinion that the accused was an old offender and ought to receive a more severe punishment than he was competent to inflict submitted the case to the sub divisional magistrate, under S.* 349, *Cr. P. C. who acquitted the accused.*

Held, *that the sub magistrate should have committed the accused to the court of session under S.* 348 *Cr. P. C. and that the irregularity could have been cured by the sub divisional magistrate by reference to the district magistrate under R.* 97 *of the Criminal Rules of Practice and Orders.*

THE FACTS of the case were as follows: The stationary sub magistrate of Guntur tried a case under Ss. 457, 380 or 411 I. P. C. He was of opinion that the accused was guilty under S. 411, I. P. C. and that as he was an old offender he ought to receive a more severe punishment than he was competent to inflict and so submitted the case to the sub divisional magistrate under S. 349, Cr. P. C. The sub divisional magistrate on a perusal of the record acquitted the accused. The sessions judge referred the case to the High Court under S. 438, Cr. P. C. holding: "S. 348, Cr. P. C. prescribes the procedure to be adopted by the magistrate, in the case of old offenders on whom he cannot inflict an adequate sentence. The magistrate should have, under that section, committed the accused to sessions, in the circumstances of this case. His action in submitting the case to the sub divisional magistrate Guntur under S. 349, Cr. P. C. was irregular and the order passed by the sub divisional magistrate Guntur on the reference, on a perusal of the record, was one without jurisdiction."

Case referred for the orders of the High Court, under S. 438 Cr P. C. by the Sessions Judge of Guntur in his letter dated 10–2–1941 Dis. 1024.

K. Raghuramiah, for Accused.
Public Prosecutor, for Crown.

ORDER

The Sub magistrate should have committed the accused to the court of session under S. 348 Cr. P. C. and the irregularity could have been cured by the sub divisional magistrate by a reference to the district magistrate under R. 97 of the Criminal Rules of Practice and Orders. But the materials on record do not warrant further proceedings and the records will be returned.

N.T.R

FULL BENCH
Cr. R. C. Nos. 1052 to 1054 of 1940
Cr. R. P. Nos. 1001 to 1003 of 1940
March 17, 1941

SIR LIONEL LEACH, C. J, MOCKETT & KRISHNASWAMI AYYANGAR, JJ.

ADILAKSHMI AMMAL
v.
EMPEROR

Prohibition Act (*Mad Act X of* 1937), *S.* 4 (1) (*a*)—*If* ultra vires.

S. 4 (1) (*a*) *of the Madras Prohibition Act,* 1937 *is completely* ultra vires *so far as the possession of ganja or any other dangerous drug is concerned.*

Dangerous drugs being in the concurrent legislative list and there being an existing Indian law permitting ganja to be possessed and the Prohibition Act not having been reserved for the assent of the Governor-General or the significance of His Majesty's pleasure, the Act is ultra vires *so far as the possession of dangerous drugs is concerned.*

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgments of the Court of the Sub Divisional magistrate of Vellore in Cr. App. Nos. 55, 56 and 57 of 1940 preferred against the judgments of the court of the second class magistrate of Vellore in C. C. Nos. 739, 740 and 741 of 1940 respectively.

M. Natesan & A. N. Veeraraghavan, for Petr.

Advocate-General (*Sir A. Krishnasami Iyer*) *& A. S. Sivakaminathan,* for Crown.

ORDER

(SIR LIONEL LEACH, C. J.)

These three petitions all raise the question whether s. 4 (1) (a) of the Madras Prohibition Act, 1937 is *ultra vires* the Provincial Legislature in so far as it relates to dangerous drugs. S. 4 (1) (a) states that whoever imports, exports, transports or possesses liquor or any intoxicating drug shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. To the sub section there is a proviso which says that nothing contained in the sub section shall apply to any act done under, and in accordance with the provisions of the Act or the terms of any rule, notification, order, licence or permit issued thereunder, but so far as dangerous drugs are concerned the total prohibition imposed by the sub section has been left unaffected.

The petitioners reside in the North Arcot district of the Madras Presidency and have been convicted on charges framed under this sub section of being in unlawful possession of ganja. The petitioner in Cr. R. C. No. 1052 of 1940 was sentenced in the court of the second class magistrate of Vellore to four months' rigorous imprisonment for being in possession of ten tolas of ganja. The petitioner appealed to the sub divisional magistrate of Vellore, who confirmed the conviction and sentence. The second class magistrate of Vellore convicted the petitioner in Cr. R. C. No. 1053 of 1940 of being in possession of one tola of ganja, and the petitioner in Cr. R. C. No. 1054 of 1940 of being in possession of two grains of the drug, and sentenced them to four months' and six weeks' rigorous imprisonment respectively. These convictions and sentences were also upheld by the sub divisional magistrate.

Ganja, which is a form of Indian hemp, is not only an intoxicating drug, but is regarded as a dangerous drug both in England and India. The English Act is the Dangerous Drugs Act, 1925. S. 1 (2) of that Act defines Indian hemp as meaning dried flowering or fruiting tops of the pistillate plant known as *cannabis satival* from which the resin has not been extracted by whatever name such tops are called. The Indian Act is the Dangerous Drugs Act, 1930. Hemp is defined by s. 2 (c) of that Act as meaning "(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis Satival*) including all forms known as *bhang, siddhi,* or *ganja;* (ii) *charas,* that is the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport, and (iii) any mixture, with or without neutral materials, of any of the above forms of hemp or any drink prepared therefrom." R. 2 of the Hemp Drugs Rules which were

framed and notified under the Madras Abkari Act 1886, as subsequently amended, defines *ganja* as meaning the dried flowering tops of cultivated female hemp plants which have been coated with resin in consequence of having been unable to seed freely and by R. 3 "hemp drugs" are given the same definition as "hemp" tn the Indian Drugs Act, 1930.

The Madras Prohibition Act applies to the Salem, North Arcot, Cuddapah and Chittoor districts of the Madras Presidency. It came into force in the North Arcot district on the 1st October 1939. S. 2 provides for the total repeal of the Madras Abkari Acts of 1886, 1905, 1913, 1915 and 1929 in respect of areas to which the Prohibition Act is applied and for the repeal of so much of Schedule II of the Dangerous Drugs Act 1930 as relates to the Madras Abkari Act, 1886. With the exception of the Dangerous Drugs Act, 1930, which is an Act of the Central Legislature, all these Acts are local Acts, being either the Acts of the Governor of Fort St. George in Council or of the Madras Legislature.

The Madras Abkari Acts did not prohibit the possession of ganja altogether. S. 13 of the Act of 1886, as amended by subsequent Acts, states that no person, not being a licensed manufacturer or vendor of liquor or intoxicating drugs shall have in his possession any quantity of liquor or intoxicating drugs in excess of such quantities as the Governor in Council may from time to time prescribe by notification, unless under a licence granted by the Collector in that behalf. The Hemp Drugs Rules framed under statutory authority were notified on the 1st February, 1936. By R. 23 a person may have in his possession in the Agency Tracts of Ganjam, Vizagapatnam and East Godavari any quantity of ganja not exceeding six tolas, in the Madras district any quantity not exceeding two tolas, and elsewhere in the Presidency any quantity not exceeding three tolas. Therefore, before the application of the Prohibition Act to the North Arcot district a person there could lawfully possess three tolas of ganja.

The petitioners say that in passing the Prohibition Act the Madras Legislature had no power to repeal the Abkari Acts so far as the possession of dangerous drugs is concerned or to prohibit the possession of such drugs, and they rely on the provisions of s. 107 of the Government of India Act, 1935. Eliminating the words of sub s. (1) of that section which have no application here, the sub section says that if any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of the section, the existing Indian law shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void. Sub s. 2 provides that where a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List contanis a provision repugnant to the provisions of an existing Indian law with respect to the matter, then, if the Provincial law having been reserved for the consideration of the Governor-General, or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, subject to a right given to the Federal Legislature to enact futher legislation with respect to the same matter after obtaining the previous sanction of the Governer-General in his discretion.

S. 311 (2) defines "existing Indian law" as meaning,

"Any law ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or peson having power to make such a law, ordinance, order, bye-law, rule or regulation".

Part III of the Government of India Act 1935 came into force on the 1st April 1937 and the learned Advocate General naturally concedes that the rules framed under the Madras Abkari Act 1886, as amended, constitute an existing Indian law within the meaning of s. 107 of the Government of India Act, 1935.

A Provincial Legislature has power,

subject to restrictions, to legislate with regard to intoxicating liquors and narcotic drugs. The power and the restrictions are both embodied in Cl. 31 of the Provincial Legislative List. This clause reads as follows :—

"Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs; but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III."

List III is the Concurrent Legislative List and by reason of the terms of Cl. 31 of the Provincial Legislative List a Provincial Legislature in legislating with regard to intoxicating liquors and narcotic drugs can only do so subject to the provisions of the Act relating to the Concurrent Legislative List and Cl. 19 of the Concurrent Legislative List places dangerous drugs in that list.

Dangerous drugs being in the Concurrent Legislative List and there being an existing Indian law permitting ganja to be possessed, the Madras Legislature could not by reason of the provisions of S. 107 legislate to prohibit entirely the possession of ganja without reserving the measure for the consideration of the Governor-General, or for the signification of His Majesty's pleasure. The Prohibition Act was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and this being the case the Madras Legislature had no power to interfere with the Madras Abkari Acts so far as the possession of dangerous drugs was concerned.

The learned Advocate General has very properly said that he cannot resist this argument, but he has asked the court not to declare S. 4 (1) (a) of the Prohibition Act to be *ultra vires* the Provincial Legislature altogether so far as dangerous drugs are concerned. Pointing to the words "to the extent of the repugnancy" in S. 107 of the Government of India Act 1935, the learned Advocate General suggests that the court should re-write sub S. 4 (1) (a) of the Prohibition Act to make it read that no person shall be in possession of ganja in excess of the quantities allowed by R. 23 of the Hemp Drugs Rules. The court has no power to re-write the sub section. The effect of S. 107 of the Government of India Act 1935 is that where the offending statute offends to a limited extent it shall be void only so far as it is repugnant to the dominant measure. As S. 4 (1) (a) now stands it is entirely repugnant to the Hemp Drugs Rules because it prohibits a person possessing any gauja whatsoever. Therefore it must be declared to be completely *ultra vires* so far as the possession of ganja or any other dangerous drug is concerned. The learned Advocate General has been unable to point to a single case, Canadian or Australian, which supports the contention that the court is entitled to say that S. 4 (1) (a) is only *ultra vires* the Provincial Legislature in part so far as dangerous drugs are concerned. If the Prohibition Act had permitted of the possession of ganja in quantities different from those permitted by the Hemp Drugs Rules, the position would have been different, but here the Prohibition Act imposes a total prohibition and therefore there is no room for even a partial reconciliation of the two Acts.

It follows from what has been said that the Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, which means that the petitioners in Cr. R. C. No. 1053 of 1940 and 1054 of 1940 have been wrongly convicted, because they were not in possession of more ganja than the law allowed. Consequently, their convictions and sentences will be set aside.

The conviction of the petitioner in Cr. R. C. No. 1052 of 1940 stands on a different basis. While the Court was wrong in convicting her under S. 4 (1) (a) of the Prohibition Act, she did commit an offence under the Abkari Act 1886, as amended. She waa found to be in possession of ten tolas of ganja whereas the maximum she could have lawfully held

without a licence granted by the collector was three tolas and she possessed no licence to hold a larger quantity than three tolas. The conviction under the Prohibition Act will be altered to a conviction under S. 55 of the Madras Abkari Act, but the sentence will be reduced to one of rigorous imprisonment for twenty days, the period during which she was in prison before being liberated on bail.

A certificate will be issued under S. 205 of the Government of India Act 1935 to the effect that the cases involve a substantial question of law as to the interpretation of the Act.

N. T. R.

—

Cr. App No. 162 of 1941
Cr. R. C. No. 216 of 1941
Taken up No. 1 of 1941
March 19, 1941

LAKSHMANA RAO, J.

NACHAL
v.
EMPEROR.

Penal Code (XLV of 1860*), Ss.* 304 *(2) &* 323 *—Beating with stones by three persons—Death due to consequent congestion of brain—Offence.*

Accused and the deceased were not friendly. Deceased was held by the tuft by the accused and assaulted with stones by accused's daughters and the deceased was found dead the next noon, death being due to congestion of the brain as the result of beating with stones.

Held (1) *the accused could not be convicted under s.* 304 (2), *I. P. C., as it was not known who caused the fatal injury; and*
(2) *there being no common intention to cause death or grievous hurt, the accused was guilty only under S.* 323, *I. P. C.*

Appeal against the order of the additional sessions judge of the court of session of the Coimbatore division in C.C. No. 215 of 1940.

N. Somasundaram & P. S. Kailasam, for Accused.
A. S. Sivakaminathan, for Crown.

JUDGMENT

The accused has been convicted under S. 304 (2), I. P. C. for causing the death of her father-in-law Irula Mooppan by beating with stones, and sentenced to rigorous imprisonment for 5 years. She appeals against the conviction and the same was taken up by Wadsworth, J. on the ground that the offence committed would be voluntarily causing hurt.

The accused and Irula Moopan were not friendly, and Irula Moopan went to P. W. 5's house on the evening of 23rd September last with some injuries, due to beating with stones. He told P. W. 5 that the injuries, were caused by the accused and her daughters aged about 10 and 8 years, and went to P. W. 7's house for the night. He stated so to P. W. 7 also, and went to P. W. 8's house next morning. He told P. W. 8 that he was held by the tuft by the accused and assaulted with stones by her daughters, and left saying that he would report to the village munsif. He was found dead at the Pillayar Koil about noon, and death was due to congestion of the brain as the result of beating with stones. These facts are not disputed and the conviction of the accused under S. 304 (2), I. P. C. is unsustainable. It is not known who caused the fatal injury and the deceased told P. W. 8 that the accused was holding him by the tuft. Even otherwise it is not suggested that there was any common intention to cause death or grievous hurt, and the accused would be guilty only under S. 323, I. P. C. The conviction of the accused is therefore altered to one under S. 323, I. P. C. and considering that she was in remand since 25th September, she is sentenced to rigorous imprisonment for the period undergone.

N.T.R. —

Cr. R. C. No. 846 of 1940
Cr. R. P. No. 799 of 1940
January 30, 1941
LAKSHMANA RAO, J.
NAGHI NAICKER & others
v.
EMPEROR

Forest Act (Mad. Act V of 1882*)—Timber Transit Rules (*1939), *r.* 1 *(d)—Scope of.*

The exemption under r. 1 *(d) of the Timber Transit Rules applies only to small wood for fuel or bamboos which are in head loads or in small quantities and does not apply to fuel in bandy loads.*

THE FACTS appear from the judgment of the lower appellate court which was as follows:

"On 5—1—40, the eight accused were in charge, each of one bandy load of wood, and were moving the same within the area coming under the operation of the Timber Transit Rules. They were asked to show their permits. They showed their permits. The permits were not valid permits because they did not bear the seal of the District Forest Officer. The Forest Range Officer Palni then charged the eight accused for transporting eight cart loads of fuel without permits within the area under the operation of the Timber Transit Rules.

"The contentions put forward by the defence before the lower court were mainly three. In the first place, it was urged, the timber had been cut in the Rettayambadi Zamin forest and no permit under the Timber Transit Rules was necessary. Secondly the wood came under the exemption given in r. 1 (d) of the Rules. Thirdly, in any view of the matter the accused could be convicted only of the one offence, that of moving timber without a valid permit, punishable under r. 2 (A) of the rules, they could not also be punished under r. 4 (c) of the Rules. The sub magistrate overruled all the three contentions, and convicted and sentenced the accused.

"The same contentions have now been urged before me in appeal.......................................

"With regard to the second contention the exemption referred to runs as follows: "In these rules, timber includes all classes of timber as defined in the Act, except....(d) small wood for fuel (excluding sandal wood, sandal wood dust and chips) and bamboos in headloads or smaller quantities". The learned sub magistrate found that the value of the eight cart loads of timber in the present case were valued at Rs. 120. He concluded therefore that they are not small wood for fuel but big logs of wood. On this ground he overruled this contention also.

"I find that the learned sub magistrate has made a small mistake. The offence report put the value of the timber only at Rs. 15 and not at Rs. 120. The Rs. 120 is the value of eight bullock carts the bandies which were carrying the timber. So the learned sub magistrate was not justified in concluding that the timber removed was big logs of wood. As a matter of fact, the evidence in the case is that the timber removed was only small wood for fuel. The offence report also charges the accused only with removing cart loads of fuel. So it is clear that the wood removed was actually small wood for fuel.

'Even granting that it is small wood for fuel, the Forest Range Officer argues that the exemption applies only to wood for fuel in headloads or smaller quantities and not to bandy loads. It is argued by the defence that the qualifying phrase "in head loads or smaller quantities applies only to bamboos, the substantive which is nearest in position to the qualifying phrase, and not to small wood for fuel. Reference has also been made to the dictum of Ashworth, J. in *Leadon* v. *Leadon* (reported at A.I.R. 1926 Oudh 319) that the general rule of interpretation is that "a qualifying word shall be deemed to qualify the word nearest to it". In this case, the qualifying phrase must be deemed to qualify "bamboos", the word nearest to it.

"In laying down that dictum Mr. Justice Ashworth was attempting to ascertain the meaning of the words where "the husband and wife reside or last resided together", the question being whether the word

"together" applies to "reside" or "last resided" or both. The intention of the Legislature in that case was rather obscure. But in this case, there is no such obscurity. The Manual of Administration for Forest Range Officers says that the term 'timber' does not apply "to small wood for fuel in headloads or less quantities". The general Model Rules for regulating the transit of timber etc. found at page 457 of the Forest Manual (1931 Edn.) also exempt "Small wood for fuel in quantities less than one head load".

"It is clear therefore that the exemption in the rules applies only to small wood for fuel and bamboos, which are in headloads or smaller quantities. In the present case, the timber was in bandy loads. Hence, I am also constrained to overrule the second contention of the defence, and to find that the exemption does not apply to fuel in bandy loads..............

I therefore confirm the conviction and sentence of the appellants for an offence under r. 2(a) with R. 10 of the rules".

The present revision was filed against the above order.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Palni dated 24—7—1940 and passed in C. A. No. 52 of 1940 preferred against the judgment of the court of the sub-magistrate of Palni in C. C. No. 265 of 1940.

A. Narasimha Iyer, for Petrs.
Public Prosecutor (V.L. Ethiraj), for Crown.

ORDER.

The interpretation of r. 1(d) of the Timber Transit Rules of 1939 by the courts below is correct and there is no ground for interference. The revision petition is therefore dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 667 of 1940
Cr. R. P. No. 627 of 1940

January 10, 1941

LAKSHMANA RAO, J.

PONNAMBALA THEVAR
v.
RAMASWAMY IYER

Estates Land Act (Mad. Act I of 1908*), S.* 212 *(d) & (e)—Conviction under.*

Where the eviction of a raiyat was not under S. 163-*A of the Madras Estates Land Act but in execution of a decree for ejectment and the raiyat trespassed into the land,*
Held, *the raiyat is guilty under S.* 447, *I. P. C. but cannot be convicted under S.* 212*(d), and (e) of the Madras Estates Land Act.*

THE FACTS appear from the following extracts from the judgment of the lower appellate court:

"Prior to 1928 appellant owned Olugu No. 2703 measuring 88 cents in Thenmambatti village. As he failed to pay the arrears of rent, the land was purchased in court auction by the Sivaganga estate which took delivery of possession on 25—12—28 and included it in Patta No. 61 in the name of the estate. But the appellant continued to occupy the land and the estate filed a suit for ejectment in O. S. 79/33 and obtained a decree. Delivery of possession through civil court was effected in E. P. 339/36 (Exs. C and C 1). In spite of this, appellant trespassed into the land on 24—10—39 and in spite of the objection raised by the complainant, P. W. 1, Peshkar of Sivaganga estate, appellant refused to vacate and ploughed the land and transplanted paddy.

"There can be no doubt that the appellant was duly ejected by the civil court after he began to occupy the land which was delivered to the Estate in December 1928. His occupaction is an offence under S. 212 (d) and his unlawful obstruction to the entry by the Estate subordinates on the land is an offence under s. 212 (1) (e). He entered the land with the intent to commit an offence under s. 447 I. P. C. and 212 (d) and (e) of the Estates Land Act..............I con-

firm the, conviction and dismiss the appeal."

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the Judgment of the court of the joint Magistrate of Devakottai dated 28—3—1940 and passed in C. A. No. 10 of 1940 preferred against the judgment of the court of the 2nd class Magistrate of Tirupattur passed in C. C. No. 3 of 1940.

C. A. Md. Ibrahim & T. S. Santhanam, for Petr.

S. T. Srinivasagopalachri & K. P. Sarvothama Rao, for Respt.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The evidence justifies the conviction under S. 447, I. P. C., but the eviction of the petitioner was not under S. 163-A of the Madras Estates Land Act and the conviction under S. 212 (d) and (e) of that Act is unsustainable. The conviction under S. 212 (d) and (e) of the Madras Estates Land Act is therefore set aside and otherwise this petition is dismissed.

N.T.R.

Cr. R. C. No. 1111 of 1940
Cr. R. P. No. 1055 of 1940
March 13, 1941.
LAKSHMANA RAO, J.
MUTHUSWMI UDAYAN
v.
EMPEROR

Penal Code (XLV of 1860), *S.* 409—*Retention by village munsif of small sums for a small priod without remitting to treasury —Offence.*

Where a village munsif collected Rs. 2–7–0 *on* 15*th March,* 1937 *and one rupee on* 17*th April,* 1937 *and remitted the amounts to the treasury on* 21*st May and* 24*th April,* 1937, *respectively, before any complaint was received,*

Held, *the retention of the amount in the interval would not by itself justify a conviction under S.* 409, *I. P. C.*

THE FACTS of the case appear from the following extracts from the judgment of the lower appellate court:

"The petitioner who was a village headman was alleged to have committed criminal breach of trust in respect of certain items of revenue collections in the year 1937 and was convicted by the sub divisional magistrate.

"On 15—3—1937 the accused collected Rs. 2—7—0 on account of patta No. 94 and Rs. 10—9—0 on account of patta No. 272, making a total of Rs. 13 from P.W. 3. This is proved by the receipt, Ex. F-1. He noted only a sum of Rs. 10–9–0 in account No. 13 on the same date and remitted the amount into the sub-treasury. An amount of Rs. 2—7—0 was thus not accounted for. Apparently, it was subsequently remitted on 21—5—1937. The case of prosecution is that there was criminal misappropriation with regard to the amount for the period from 15—3—1937 to 21—5—1937, for more than two months. The appellant has no explanation except that owing to oversight he failed to remit the amount, but did so subsequently when making the last remittance. But he made several remittances into the treasury during the interval. It is true that the amount is small, and as the learned vakil for the appellant stresses, it has not been proved that the appellant was in impecunious circumtances. But the obligations of a village headman with regard to revenue collections are strict and well known. It can hardly be assumed that the appellant was ignorant of them. His failure to remit over an appreciable period can give rise only to one rational inference, viz., that of criminal misappropriation. The smallness of the amount does not, by itself, negative such an inference. The same remarks apply with regard to the amount of Re. 1 collected on 17—4—1937 but remitted only on 21—5—1937. Here again there were intermediate remittances. The appellant did not prove his version that the Re. 1 was a bad coin and that he returned it, only to subsequently collect and remit it. But as the learned magistrate observes, this does not explain the receipt for Rs. 9—2—0 instead of Rs. 8—2—0 (Ex. F-2). With regard to the second and third items, I agree with the lower court that criminal misappro-

priation has been proved in respect of these items for the periods concerned.

Against this order the preeent revision was filed.

Petition under Ss. 435 & 439, Cr. P. C. 1898, praying the High Court to revise the order of the court of session of North Arcot Division at Vellore dated 12—11—40 and made in C. A. No. 69 of 1940 preferred against the order of the court of the sub-divisional magistrate of Tiruvannamalai in C. C. No. 84 of 1940.

V. T. Rangaswami Ayyangar, for Applt.
Public Prosecutor (V, L. Ethiraj), for Crown

ORDER.

The petitioner was the village munsif of Chetput and he collected Rs. 2—7—0 from P.W. 2 on 15th March, 1937 and one rupee from P. W. 3 on 17th April, 1937. The amounts were remitted to the treasury on 21st May and 24th April, 1937 respectively before any complaint was received and retention of the amount in the interval would not by itself justify the conviction under s. 409 I. P. C. The conviction of the petitioner under S. 409, I.P.C. is therefore set aside and the fine if levied will be refunded.

N.T.R. — *Conviction set aside.*

CR. R. C. No. 59 OF 1941.
CR. R. P. No. 58 OF 1941.
April 9, 1941.
LAKSHMANA RAO, J.

VALLIAMMI AMMAL
v.
DHARMALINGA MUTHIRIAN

Cr. P. C. (V of 1898), S. 488—Indebtedness of husband—Effect.

The indebtedness of the husband is no ground for dismissing a petition by the wife under S. 488, Cr. P. C.

THE FACTS were as follows: The joint magistrate found that the wife petitioner was more to blame for their separation than the husband counter petitioner and then said in the course of his judgment as follows:

"D. Ws. 5 to 10 have been examined by the respondent and they have filed Exx. 3 to 11 proving that the respondent is very heavily involved in debts. These documents appear to be genuine ones and most of them are registered documents and there is no reason to think that they are got up for the purpose of this case. In fact a good many of them came into existence in 1937, when nothing about this case was even heard of. These documents go to show that the respondent has not got sufficient means to give monthly allowance to his wife who seems to have left him and gone to Trichinopoly without adequate reason.

"In conclusion, therefore, I do not think that the petitioner is entitled to receive maintenance from her husband and therefore her petition is dismissed."

Against that order the present revision was filed.

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Karur in M. C. No. 50 of 1940.

T. R. Srinivasan, for Petr.
K. Aravamuda Ayyangar, for Respt.
K. Venkataraghavachari, for Crown.

ORDER

The petitioner and the counter-petitioner were living together till 1930 and the recitals in Ex. II, the compromise of 1927, are irrelevant. Further the plea of adultery was belated and as observed by the joint magistrate the evidence is worthless. The petitioner was not even questioned, and the notice issued by the petitioner in 1937 for her maintenance was refused. No reply was sent to the notice issued in 1939 and the claim for maintenance is irresistible. The indebtedness of the counter-petitioner is no ground for dismissing the petition and the order of the joint magistrate cannot be sustained. It is therefore set aside and the petition is remanded to him for awarding the appropriate maintenance after taking further evidence on the point, if desired.

N.T.R. *Order set aside*

Cr. App. No. 96 of 1941
April 2, 1941
LAKSHMANA RAO, J.
The CROWN PROSECUTOR, MADRAS
v.
ABDUL WAHAB & another

City Police Act (*Mad. Act III of* 1888), *S.* 37 (3)—*Offence under.*

On information that the first respondent was receiving bets on horse races the police sent P. W. 2 *with a slip containing the names of horses and four annas. P. W.* 2 *handed over the slip and cash to the first respondent who retained the cash and passed the slip to his clerk, the second respondent. Second respondent wrote something over the slips and gave them to the first respondent who returned one slip to P. W.* 2. *The police rushed to the place and* 10 *betting slips, an acceptance form and* 15 *annas in cash were found on the first respondent. The second respondent had a pencil on him and the betting slip was with P. W.* 2.

Held, *that the first respondent would be guilty under S.* 37, *cl .* (3) *of the Madras City Police Act, but as the second respondent was not gaming as defined in the Act, he would not be guilty of the offence.*

Appeal under s. 417 Cr. P. C., 1898 against the order of acquittal dated 8-11-1940 of the aforesaid respondents (accused 1 and 2) by the special honarary Presidency Magistrate, Egmore of the Court of the Presidency Magistrates, Egmore, Madras in C. C. No. 2245 of 1940 on his file.

Crown Prosecutor (P. Govinda Menon), in person.

C. K. Venkatanarasimham, for accused.

JUDGMENT.

This is an appeal by the Provincial Government against the acquittal of the respondents of an offence under s. 37, cl. (3) of the Madras City Police Act.

The second respondent is the clerk of the first respondent and the prosecution case is that on information that the 1st respondent was receiving bets on horse races in the Suparikunta in Badai Sahib Street, P. W. 1, the sub inspector sent P. W. 2 with a slip Ex. B-2 containing the names of horses and four annas. P. W. 2 handed over the slip and cash to the first respondent and the first respondent retained the cash and passed the slip to the second respondent. The second respondent wrote something over the slips and gave them to the first respondent and the first respondent returned one slip Ex. A to P. W. 2. The sub inspector rushed to the place and ten betting slips, Ex. B series, an acceptance form Ex. C and 15 annas in cash were found on the first respondent. The second respondent had M. O. 2 the pencil on him and Ex. A the betting slip was with P. W. 2.

These facts are spoken to by P. Ws. 1 and 2 who were not seriously cross-examined, and the search witnesses could have been examined by the magistrate if necessary. The evidence of D. Ws. 1 and 2 is not entitled to any weight and on the evidence the fist respondent would be guilty under s. 37, Cl. (3) of the Madras City Police Act. The second respondent was not found gaming as defined in the Act and he would not be guilty of the offence. The acquittal of the first respondent is therefore set aside and he is convicted under s. 37, Cl. (3) of the Madras City Police Act and sentenced to pay a fine of Rs. 5 with simple imprisonment for one week in default.

The acquittal of the second respondent is correct and the appeal is dismissed as against him.

N.T.R. —

CR. R. C. No. 637 of 1940
CR. R. P. No. 598 of 1940

December 12, 1940

LAKSHMANA RAO, J.

Peta VENKAYYA
v.
S. SEETHAYYA & another

Cr.P. C. (*V of* 1898), *S.* 250—*Award of compensation under.*

Where leaves from certain trees were cut and a complaint was made under Ss. 426 *and* 447, *I. P. C., the fact that the accused were*

found to be entitled to the leaves would not make the complinat false, frivolous or vexatious to justify an order under S. 250, Cr. P. C.

Petition under ss. 435 and 439, Cr.P.C, 1898 praying the High Court to revise the order of the court of the sub divisional magistrate of Tenali dated 28-2-1940 and passed in C. A. 23 of 1940 preferred against the order of the court of the stationary sub magistrate of Tenali in C. C. No. 230 of 1939.

A. Bhujanga Rao, for Petr.

V. Subramaniam, for Respts.

Public Prosecutor (V.L. Ethiraj), for Crown.

ORDER

The complaint was under ss. 426 and 447, I. P. C., and the cutting of the leaves was not disputed. That the accused were found to be entitled to the leaves would not make the complaint false and frivolous or vexatious and the order under s. 250, Cr. P. C. cannot be sustained. It is therefore set aside and the amount of compensation, if levied, will be refunded.

N.T.R. *Order set aside.*

Cr. R. C. No. 207 of 1940
Cr. R. P. No. 199 of 1940

October 29, 1940

LAKSHMANA RAO J.

NILAKANTA IYER
v.
Thatha PICHAIKARAN & others.

Cr. P. C. (V of 1898*), Ss.* 421 *&* 422*—Appeal—Hearing.*

Where two criminal appeals were closed without any hearing on a particular day though one of the appeals was presented only that day,

Held *the order disposing of the appeals cannot be sustained.*

The facts were these: There was a case of rioting in respect of which the police filed a charge sheet before the sub magistrate, who convicted the accused on 6—10—39. The accused 1 and 2 preferred an appeal before the joint magistrate on 9—10—39 and the magistrate, after issuing the necessary notice, posted the appel for hearing to 1—11—39. On 1—11—39 an appeal on behalf of accused 3 to 7 was also presented and the magistrate admitted the appeal, clubbed it along with the previous appeal by accused 1 and 2 and directed the advocate to argue the appeal. The advocate applied for an adjournment as he was not ready to argue the appeal. The adjournment applied for was refused and the advocate pleaded inability to advance arguments. The case was thereafter adjourned for orders and orders were pronounced on 29—11—39 acquitting the accused. The present revision was filed against the order of acquittal on the ground that the magistrate erred in disposing of the appeals merely upon a perusal of the records without hearing any of the parties.

Petition under ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the judgment in Cr. Apps. Nos. 28 and 30 of 1939 dated 29—11—1939 on the file on the court of the Joint Magistrate of Karur (C. C. No. 873 of 1938 on the file of the court of the stationary sub magistrate Kulitalai).

K. S. Jayarama Ayyar & S. V. Venkatasubramania Ayyar, for Petr,

A. V. Narayanaswami Ayyar for Respts,

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The appeals were closed without any hearing on 1st November 1939, though one of the appeals was presented only that day and the order of the Joint Magistrate cannot for that reason be sustained. It is therefore set aside and the appeals are remanded to the District Magistrate of Trichinopoly for disposal by him or such other Magistrate as he may direct.

N.T.R. *Petition allowed.*

Cr. R. C. 619 of 1940
Case Ref. No. 27 of 1940

October 15, 1940

LAKSHMANA RAO, J.

ARDHANARI IYER
v.
EMPEROR

Forest Act (Mad. Act V of 1882*), S.* 43—*Confiscation under.*

The court has under s. 43, *Madras Forest Act a discretion and is not bound to confiscate the whole property seized.*

FACTS: "The appellant applied for permission to the District Forest Officer to cut some sandalwood trees in S. Nos. 549 and 593 of Bargur and the trees to be cut were accordingly marked by the Range Officer on 23—4—39. After cutting the trees, the appellant applied to the D. F. O. again for removing them, on 5—6—39 and 25—7—39. The D. F. O. definitely refused permission and drew his attention to the provisions of the rules with which he was directed to comply. Meanwhile, the appellant removed the trees from the place where they were cut to S. No. 546 another patta filed far off, without a permit as required under r. 3 of the said rules and without a property mark affixed on them as required under r. 9 (ii). Nor were the exact places of the trees from which they were cut pegmarked as required by r. 9 (iii) (a) (4) of the said rules. On knowing this unauthorised removal, the Range Officer seized the sandalwood concerned and instituted a case. The accused admitted the facts but pleaded not guilty. The lower appellate court held that the provisions of the Sandalwood Transport Rules had not been complied with and that the acccused was guilty under r. 12. Then the judgment of the lower court said " The sandalwood seized, which is valued at Rs. 1500 has been ordered to be confiscated..............................In this case the appellant got permission to cut the trees.......... ....His only offence was that he moved them to another patta field for carrying on further processes and that also after submitting some petitions for permission for removal. There was no intention to defraud Government. It would certainly be a crushing punishment to confiscate the seizures. The Act says that the seizures shall be liable to be confiscated. The S. M. has taken it and the P. I. also argues that therefore the seizures shall be confiscated. "Shall be liable" appears different from "shall be" confiscated and does not make confiscation imperative. As confiscation does not appear warranted in this case, I reverse the order and direct that the seizures be released, subject however to the further observance of the rules." The district magistrate made this reference to the High Court for an order revising the lower appellate court's order and for confiscating the seizures, as "under S. 43 Madras Forest Act the court has no option under such circumstances but to confiscate the whole property."

Case referred for the orders of the High Court under S. 438, Cr. P. C., by the district magistrate of Coimbatore in his letter C. R. C. No. 20 of 1940 dated 9—8—1940.

A. S. Sivakaminathan, for Crown
L. S. Veerarahava Iyer, for Accused.

ORDER

The view of the district magistrate is opposed to the language of S. 43 of the Madras Forest Act and the Public Prosecutor does not support the reference. The records will therefore be returned.

N. T. R.

Cr. R. C. No. 910 of 1940
Cr. R. P. No. 863 of 1940

December 20, 1940

LAKSHMANA RAO, J.

SHEKU SAHIB
v.
VENKATARAMANYYA

Penal Code (XLV *of* 1860), *Ss.* 379 & 114—*Attachment in execution by amin—Claim petition allowed—Decree holder, if liable to conviction under.*

Where property is attached by the amin in execution of a decree at the instance of the decree holder, the fact that a claim petition in respect of the property attached is allowed does not warrant a conviction of

the decree holder under s. 379 read with s. 114, I. P. C.

THE FACTS were: The accused had obtained a decree against the brother-in-law of the complainant and filed an execution petition and obtained and executed a warrant of attachment. The decree holder accompanied the amin to the house of the complainant and seized 65 goats in spite of the protests of the complainant. The complainant preferred a claim petition in the district munsif's court that the goats belonged to him and not to the judgment debtor and the petition was allowed. He then filed a complaint under s. 379 against the accused. The accused was convicted by the lower courts and preferred the present revision against his conviction.

Petition under ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Hosur dated 6—7—1940 and passed in C. A. No. 26 of 1940 preferred against the judgment of the court of the Special Third Class Magistrate of Hosur passed in C. C. No. 2 of 1940.

C. K. Venkatanarasimham, for Petr.

N. Somasundaram, for Respt.

Public Prosecutor, (V. L. Ethiraj), for Crown.

ORDER

The property was attached by the amin in execution of a decree at the instance of the petitioner and the fact that the claim petition of the complainant was allowed does not warrant the conviction of the petitioner under s. 379 read with s. 114, I. P. C. The conviction is therefore set aside and the fine if levied will be refunded.

N.T.R. — *Conviction set aside*

Cr. R. C. No. 504 of 1940
Cr. R. P. No. 479 of 1940

November 22, 1940

LAKSHMANA RAO, J.

S. YEGNANARAYANIAH
v.
EMPEROR

Local Boards Act (Mad. Act XIV of 1920), Sch. IV, R. 24—Enhancement of tax by special officer—Notice.

R. 24 of Sch. IV of the Madras Local Boards Act does not require any notice before the tax is enhanced by the special officer.

THE FACTS appear from the judgment of the lower court which was as follows:

"The accused is charged by the Special Officer of Sermadevi Panchayat Board for failure to pay house tax for the half year ending 31st March, 1940 under r. 33 (2) and 39 of Sch. IV of the Madras Local Boards Act.

The Special Officer, Panchayat Board, Sermadevi, deposes that he amended the assessment book on 12—11—1939 and gave notices afterwards. He went in person to distrain the property of the accused on 28—3—1940 and learnt from the accused's son that the accused had gone to some place.

The question now is whether in this case there are circumstances to justify a prosecution under r. 39 of Sch. IV of Madras Local Boards Act. It is to be satisfactorily proved that the accused wilfully prevented distraint... ....It was also contended that the Special Officer has not complied with the provisions of the Act and so the amount was not paid and as such there was no wilful omission on his part to pay. It is admitted that the Board has sent notice under r. 24. The special officer has amended and then given the notice of such amendment under R. 24. Such amendment shall be deemed to have taken effect on the first day of the half year in which it is made. He has amended the books on 12—11—1939 and the demand notice is on 18—11—1939. Only when the amendment is made in any half year after the demand notice for that half year has been issued, it shall have effect only from the succeeding half year. But in this case the demand notice does not precede the amendment. We therefore find that the prosecution case is conclusively proved. The accused has therefore wilfully omitted to pay the tax when demanded."

The notice of demand for house tax was served on 18—11—39 and notices of amendment of assessment was served on 19—11—39. The revision was filed against the order of the lower court convicting the petitioner under rr. 33 (2) & 39 of Sch. IV

Local Boards Act on the ground, *inter alia*, that the act of the panchayat officer in amending the tax books so as to increase the house tax without notice to the accused was illegal and *ultra vires*, as being opposed to the provisions of r. 24 of Sch. IV of the Madras Local Boards Act.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the magistrate of 1st class bench, Ambasamudram, dated 27—5—1940 in S. C. No. 401 of 1940.

K. R. Rama Iyer, for Petr.
Public Prosecutor (*V.L. Ethiraj*), for Crown.

ORDER

The tax was enhanced by the special officer under r. 24 of Sch. IV of the Madras Local Boards Act and the rule does not require any notice before the tax is enhanced. The notice of demand was duly served and the evidence shows that the son of the petitioner prevented the distraint of his properties. There is therefore no ground for interference with the conviction and the revision petition is dismissed.

N.T.R. *Petition dismissed.*

Cr. R. C. No. 475 of 1940
Cr. R. P. No. 451 of 1940

October 4, 1940

LAKSHMANA RAO, J.

Thakamparambath ABDURAHIMAN HAJI
v.
EMPEROR

Merchant Shipping Act, 1923, *S*. 274(1)—*Accused's timber washed away—Recovery —No offence.*

Where planks were washed away from accused's timber-yard and were floating down towards the sea in low tide and were recovered by the accused, the planks rescued is not a wreck and the accused is not bound to report the recovery to the receiver of wrecks under S. 274 *(1) (a), Merchant Shipping Act and his failure to do so does not amount to an offence under S.* 274.

THE FACTS appear from the judgment of the lower court which was as follows:

The accused is charged for an offence under S. 274 of the Indian Merchant Shipping Act 1923, in that he took possession of certain wrecks from a tidal river but did not report the fact to the Receiver of Wrecks.

The accused admits that he, through his men, took possession of the wreck. The prosecution evidence also proves that the wreck was taken possession of by the accused through his workmen. The fact that no report was given is also admitted by the accused.

The accused's case is that what he took possession of was not a "wreck". The accused has a timber-yard about one furlong up the river. His case is that the previous night some planks were disturbed from his yard and that when they were floating down towards the sea in low tide his men informed him and he asked them to bring them back which they accordingly did. The prosecution does not say that the planks are not of the accused. One of the witnesses says that the accused's workmen said that the planks were washed away from the accused's ttmber-yard. The place from where the planks were rescued is two furlongs from the sea and one furlong from the accused's yard. There were more than 100 mango planks.

The accused did not examine any witnesses. It is pointed out on his behalf that all the facts relied upon by the accused have been proved by the witnesses themselves.

The only question to be decided in this case is whether the planks rescued by the accused formed " wreck " as has been defined in 272 of the Act. The learned advocate for the accused points out that the planks forming the subject matter of this case do not come under any of the clauses (a) to (e) in s. 272. Obviously these planks do not come under cls. (d) and (c). As regards cls. (a), (b) and (c), I think they do not come under those clauses also, because nothing will be a 'wreck' under those clauses unless it had reached or

touched the sea. The planks in this case did not reach or touch the sea. So I agree that these planks do not constitute wreck under Cls. (a) to (e). But this section does not contain an exhaustive definition of "wreck." The words used is only 'includes' and not 'means'. The difference in my opinion is that there may be other things which are wrecks. A thing which was tied to the shore in a tidal river and which became loose and floated down the river is also clearly a 'wreck' in my opinion. I hold therefore that the accused was bound to report the finding to the Receiver of Wrecks under cl. (a) of s. 274 (1) and admittedly he failed to do so. I therefore find him guilty under s. 274 (2) and sentence him to pay a fine of Rs. 15 and in default to suffer simple imprisonment for one week."

Against this order the present revision was filed.

Petition under ss. 435 and 439, Cr.P.C. 1898 praying the High Court to revise the order of the court of the sub divisional magistrate, Calicut dated 20—5—1940 and passed in C. C. No. 56 of 1940.

V. Rajagopalachari & M. S. Varadachariar, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER.

The case of the petitioner that the planks in question were washed away from his timber yard was not disputed and his conviction under s. 274 (1) of the Indian Merchant Shipping Act, 1923, is unsustainable. It is therefore set aside and the fine, if levied, will be refunded.

N. T. R. — *Conviction set aside.*

Cr. R. C. No. 203 of 1940.
Cr. R. P. No. 195 of 1940

September 26, 1940.

LAKSHMANA RAO, J.

MACHINARI LAKSHMI AMMA
v.
THUNDIKANDIYIL PARKUM NATUKANDIYIL KOYITHTTA KRISHNA KURUP.

Cr. P. C. (V of 1898). s. 488—Malabar marriage before Marumakkathayam Act—Presumption of continuance — Income of tavazhi properties not sufficient—Maintenance to infant son.

A marriage between Nairs which has not been dissolved before the Madras Marumarkkathayam Act of 1932 came into force must be deemed to be a legal marriage.

Where the income of the thavazhi properties of the petitioners under S. 488 Cr. P. C., namely, the wife and son, is very little, the infant son is also entitled to maintenance under S. 488, Cr. P, C.

THE FACTS: appear from the judgment of the lower appellate court which was as follows:

"This is an application for maintenance. The parties are Nayars. They were married in 1101 M. E. 14 years ago. There is a boy by the union. He is 9 years old. In 1108 M. E. the counter petitioner contracted an alliance with a Gounda woman. The petitioner's case it that on account of that the petitioner took her to her house and left her there and thereafter lived with the Gounda woman mainly, but still continued to visit the petitioner now and then till four years ago. The counter petitioner's case is that on account of his alliance with the Gounda woman, the petitioner's people took away the petitioner and thereafter he had nothing to do with her and so the petitioner is not now his wife. The counter petitioner also says that for the same reason the petitioner's uncle who had been married to counter petitioner's sister separated from his wife and sent her to counter petitioner's house.

Now the first point to be considered in this case is whether the marriage between the parties is subsisting. If, as contended by the counter petitioner, the separation was early in 1108 M. E., then the marriage was not in force when the Madras Marumakkathayam Act came into force and is not subsisting now. The petitioner admits that the alliance with the Gounda woman was contracted in 1108. It seems to me that the petitioner's statement that even after that alliance the counter petitioner was visiting her now and then and main-

taining her is too unlikely to be believed. It is not natural. The separation between petitioner's uncle and the counter petitioner's sister shows that the counter petitioner's alliance with the Gounda woman created a complete split between the two families. It is not therefore likely that the counter petitioner would have continued to visit the petitioner after that. This story of the visits being continued is apparently intended only to make it appear that the marriage subsisted on the date of the coming into force of the Madras Marumakathayam Act. I do not believe it. I hold that the petitioner is not counter petitioner's wife.

Then there is the child. The counter petitioner contends that the family of the petitioner has quite enough to maintain the child. The family karar shows that the petitioner's tavazhi consisting of nine members has properties yielding Rs. 36 and 1,000 edangazhis of rice. This works out to very little, but I am not satisfied that the family is in difficulties for their maintenance. I have held that the parties separated about seven years ago. At that time the boy was only two years old. Even according to the petitioner, the counter petitioner has not been giving her and the boy anything for the last four years. All these years the petitioner has not claimed any maintenance. To explain the delay in claiming maintenance the petitioner says that her uncles were trying to reconcile the couple.

The application is rejected".

This revision was filed against that order.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Calicut dated 20—12—1939 and passed in M.C. No. 248 of 1939.

T. R. Ramachandran, for Petr.

P. Govinda Menon, for Respt

Public Prosecutor (*V.L. Ethiraj*), for Crown.

ORDER.

The marriage was not disputed and the evidence does not warrant the conclusion that it was dissolved before the Madras Marumakkatayam Act of 1932 came into force. The marriage has therefore to be deemed to be a legal marriage and on the finding of the sub divisional magistrate that the income of the tavazhi properties of the petitioners is very little, the infant son is also entitled to maintenance. The order of the sub divisional magistrate is therefore set aside and the petition is remanded to him for fixing the appropriate rate of maintenance for the petitioner and her infant son and passing the order under s. 488, Cr. P. C.

N.T.R. *Order set aside.*

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Cr. R. C. No. 215 of 1940
Cr. R. P. No. 207 of 1940

September 20, 1940.

LAKSHMANA RAO, J.

PONNUSWAMI PADAYACHI & another
v.
EMPEROR.

Cr. P. C. (V of 1898), *S.* 195—*Attached properties left with sureties—Removal from —Prosecution—Sanction.*

Where attached properties were removed from the possession of the sureties with whom they were left by the amin and a prosecution under S. 379 *was launched,*

Held, *the complaint of the court was not necessary for the prosecution.*

The Facts appear from the following extracts from the judgment of the lower appellate court:

"Accused 1 was the judgment debtor in the decree in S. C. No. 388 of 1935, on the file of the Kumbakonam sub court. The amout due to the decree holder under the decree amounted to Rs. 400 at the beginning of 1939. The decree-holder filed an execution petition in the sub court in February 1931 for the attachment and sale of the debtor's movable property in order to realise the debt. He filed a list of the movables sought to be distrained and as seems to be usual in such cases, he nominated P. W. 1 as his agent for the purpose of accompanying the court's amin and point out the properties to be distrained. P. W. 1 was no other than the decree

holder's brother. The court issued a warrant, Ex. C, directing the attachment of accused 1's properties as applied for and entrusted it to P. W. 4, the amin, for execution on 2nd February 1939; the amin proceeded to Vadugumidi village where accused 1 was residing. P. W. 1 accompanied him with two of his tenants, P. Ws. 2 and 3 and a friend P. W. 7.

"The amin then distrained three heads of cattle, one horse and three bandies which were standing in the compound and which P. W. 1 pointed out to him as articles belonging to accused 1. They took these properties to a chatram on the road to Kumbakonam about two furlongs off from accused 1's house. There the amin entrusted the properties to P. Ws. 1 and 2 for custody pending their disposal by the court, after obtaining from them security bond, Ex. A...Accused 2 came on the scene....He promised to go to the accused 1 and get the money in order to have the properties released and he asked P. W. 1 to await his return. He returned in a short while with a body of about 20 men and at accused 2's directions the men seized the properties and carried them away". P. W. 1 then presented the complaint against the accused. The lower courts convicted the the accused 3 and 11, who preferred the revision petition *inter alia*, on the ground that a complaint by civil court under S. 195 Cr. P. C. was necessary for their prosecution.

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the Joint Magistrate of Kumbakonam in C. A. No. 37 of 1939—C. C. No. 173 of 1939 on the file of the court of the sub Magistrate, Tiruvadamarudur.

S. Nagaraja Ayyar, for Petrs.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The properties were removed from the possession of the sureties with whom they were left by the amin and the complaint of court was not necessary for a prosecution for the offence under S. 379 I. P. C. There is therefore no ground for interference and the revision petition is dismissed.

N. T. R. — *Petition dismissed.*

Cr. R. C. No. 282 of 1940

Cr. R. P. No. 271 of 1940

September 6, 1940

LAKSHMANA RAO, J.

K. G. MONAPPA
v.
A. VENKATASAMI NAIDU & others

Cr. P. C. (V of 1898), S. 190—Complaint under S. 500—Taking on file under S. 182—Legality.

Where the complaint against the accused was under S. 500 I. P. C., the magistrate cannot take it on file under S. 182, I. P. C.

FACTS: The complainant who was a forest ranger filed a complaint against the accused who were forest lessees. The allegations were: "On 17—9—1938, the accused above named submitted a memorial to the Conservator of Forests, Coimbatore signed by themselves and certain others containing deliberately false and highly defamatory allegations against the complainant. The accused evidently to make sure, that serious action was taken against the complainant, submitted copies of the same memorial signed by them and others to the Chief Conservator of Forests, Madras, to the District Magistrate and Collector, Madura and to the District Forest Officer, Madura. The memorial above referred to contain the following highly defamatory matter..........The above allegations are deliberately false and were made by the accused out of ill-feeling against him on account of his taking action against some relations of the accused. The accused memorialised with the deliberate intention of getting the complainant removed from office. As a result of the above false allegations being published to his departmental superiors and others, the complainant has been lowered in the estimation of his friends and the public". The sub divisional magistrate to whom the complaint was made held "This is only an offence under S. 182, I. P. C. Taken on file and transferred to the sub magistrate Periakulam for disposal according to law". Against that order the present revision was filed.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the order of the court of the additional district magistrate of Madura dated 15—1—1940 and made in C. C. No. 1 of 1940.

A. K. Pavithran, for Petr.
N. Somasundaram, for Respts.
Public Prosecutor (*V. L. Ethiraj*), for Crown

ORDER

The complaint was under S. 500, I. P. C., and the order of the additional district magistrate taking it on file under S. 812, I.P.C., is unsustainable. It is therefore set aside and the complaint will be enquired into afresh by the district magistrate or such other magistrate as he may direct in accordance with law.

N.T.R.

Cr. R. C. No. 439 of 1940
Case Ref. No. 19 of 1940.
September 27, 1940.
LAKSHMANA RAO, J.
PANNALALL MARWARI
v.
T. M. KRISHNASWAMI PILLAI

Cr. P. C. (V of 1898), S. 436—*Quashing charge—Penal Code, S.* 409—*Scope of.*

A charge framed by a sub magistrate cannot be quashed by the additional district magistrate under S. 436, *Cr. P. C.*

Where the allegations were that the accused who was an agent of a firm of moneylenders disposed of certain jewels pledged with the firm by the complainant in violation of the terms of the contract between them and thereby committed criminal breach of trust,

Held, *the offence does not fall under S.* 409 *I. P. C.*

FACTS: The accused was the agent of the firm "Chaganmall Moolchand & Co.", which carried on money lending business at Kumbakonam, and at various other places. The complainant pledged certain jewels with the accused as security for a loan taken by him. There was apparently an agreement written or oral between the complainant and the accused regarding the conditions of repayment of the loan and about the procedure to be adopted regarding the sale of the jewels in the event of the complainant failing to observe the terms of the agreement. It was alleged by the complainant that the accused without giving him due notice dishonestly disposed of the jewels on 31—10—1939 in violation of the terms of the contract between them, and thereby committed criminal breach of trust. It was further alleged that the accused in the same capacity as agent of the said company received a part payment of Rs. 50 on 26—11—1939 to be credited towards interest on the loan taken by the complainant, but that the accused dishonestly misappropriated the same without crediting it to his account and thereby committed another offence under the same section, viz. S. 406 I. P. C.

The stationary sub magistrate framed charges on the two counts for an offence under S. 406 I. P. C. against the accused. The accused put in a petition under S. 435 Cr. P. C. to the additional district magistrate stating that the offence would fall under S. 409 I. P. C., that the framing of charges by the stationary sub magistrate for an offence under S. 406. I. P. C. was illegal, and that the charges might be quashed and the case transferred to the sub divisional magistrate, Kumbakonam, for disposal. The additional district magistrate, after hearing both the parties held that the offence alleged in the complaint would come under S. 409 I. P. C. and not under S. 406 I. P. C., quashed the charge under S. 406 I. P. C. and directed a fresh enquiry into the complaint by the sub divisional magistrate. The district magistrate agreed with the additional district magistrate that the offences alleged in the complaint would fall under S. 409 I. P. C. but reported the case to the High Court under S. 438 Cr. P. C. for cancelling the order of the additional district magistrate, as the charge framed by the sub magistrate could not be quashed under S. 436 Cr. P. C.

Case referred for the orders of the High Court under S. 438, Cr. P. C., by the district

magistrate, Tanjore in his letter dated 19—6—1940, R. C. No. 2715 of 1940.

V. Rajagopalachari, for Accused.
V. R. Venugopalan, for Complainant.
Public Prosecutor (V. L. Ethiraj) for Crown

ORDER

The additional district magistrate had no jurisdiction to quash the charges framed by the stationary sub magistrate and his order under S. 436, Cr. P. C., is set aside. But the offence, if any, does not fall under S. 409, I. P. C., and the case will go back to the stationary sub magistrate of Kumbakonam for disposal according to law.

N.T.R.

CR. R. C. No. 156 of 1940
Cr. R. P. No. 148 of 1940
September 12, 1940

LAKSHMANA RAO, J.

RAJU alias Marudaveera Achari & others
v
ABDUL RAHIMAN SAHIB & others.

Cr. P. C. (V of 1898), S. 145—Order based on statements to police not on record and not cross examined—Not valid.

Where *an order under S. 145, Cr. P. C. was to a large extent based on statements alleged to have been made by the petitioners to the sub inspector of police, which were not on record and about which the petitioners were not questioned,*

Held, *the order cannot be sustained.*

THE FACTS appear from the following extracts from the order of the lower appellate court.

"Maruda Veera Asari (P. 1) and Subbaraya Udayar (P. 2) of Sendamangalam village, put in a petition for an order under S. 145, Cr. P. C., restraining the counter petitioners Abdur Rahiman and four others from interfering with the petitioner's possession of the lands mentioned in their petition. It was stated that because of their interference, there was a liklihood of a breach of peace. From the report of the police also it was seen that there was a liklihood of a clash between these two parties re: the possession of the disputed land, unless action under s. 145 Cr. P. C. was taken. A preliminary order under s. 145 Cr. P. C. was therefore served on both the parties. They filed their written statements. The contention of the C. Ps. is that they are in possession of the disputed land and that they have raised cotton crop on it.

"The most important point for consideration is this. The petitioners did not say anything in their petition regarding the raising of any crop or cotton by them. But during the enquiry by the police they stated before the sub inspector (C. W. 1) that the C. Ps. had forcibly entered on the land and sowed cotton a month prior to the enquiry. In court quite contrary to this statement they have not only stated that cotton was raised by P. W. 3, but also have produced witnesses to corroborate their statement. This clearly shows how far these petitioners are capable of creating and manufacturing evidence. From the records of enquiry it is seen that at first when they put in the petition, they had no idea as to what allegations they should make. So they merely complained of physical interference by the C. Ps. During police enquiry, finding cotton crop on the disputed land, they seem to have thought of alleging forcible entry by the C. Ps. within two months before filing their petition and lastly when they came to court they thought that they could make their case stronger by saying that the cotton was raised by themselves, and they also managed to get witnesses to speak so. The above facts show how the petitioners have been developing their case. There seems to be weight in the suggestion of the C. Ps. that this petition has been engineered as a counterblast to the one put in by C. Ps. to the D. S. P.

"In conclusion I find that the C. Ps. are in possession of the disputed land. I therefore declare that they are entitled to possession of the disputed lands until evicted therefrom in due course of law. I also forbid the petitioners from disturbing the pos-

session by the C.Ps. until such eviction. The crops which are in charge of the V.M. should be handed over to the C.Ps."

Petition under Ss. 435 & 439, Cr.P.C. 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Namakkal dated 20—1—1940 and made in M.C. No. 46 of 1939.

K. S. Jayarama Ayyar & M. C. Srinivasan, for Petrs.

N. Somasundaram, for Respt.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

The order is to a large extent based on statements alleged to have been made by the petitioners to the Sub Inspector of Police which are not on record, nor were the petitioners questioned about these statements. The order is therefore set aside and the petition under S. 145, Cr.P.C. is remanded for fresh disposal by the District Magistrate or such other magistrate as the District Magistrate may direct.

N.T.R.

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Cr. R. C. No. 922 of 1940
Cr. R. P. No. 875 of 1940
March 7, 1941
LAKSHMANA RAO, J.
MOHAMMAD ABDUL WAHAB
v.
EMPEROR

Cr. P. C. (V of 1898), S. 342 — Examination of additional witnesses after charge—Accused not examined—Effect.

Where the accused was not examined under S. 342, Cr. P. C. after the examination of two additional witnesses who were examined after the charge was framed,

Held, *the omission vitiated the trial of the accused.*

Petition under Ss. 435 & 439, Cr.P.C. 1898, praying the High Court to revise the judgment of the Court of Session, Kistna division, dated 21—10—1940 and passed in C. A. No. 14 of 1940 preferred against the Judgment in C.C. No. 73 of 1939 on the file of the court of the joint magistrate, Bezwada.

V. T. Rangaswami Ayyangar, for Petr.

Public Prosecutor (V. L. Ethiraj) & K. Venkataraghavachari, for Crown.

ORDER.

The petitioner was not examined under s. 342, Cr. P. C. after the examination of P. Ws. 6 and 7, who were examined after the charge was framed and, as held in *Varisai Rowther* v. *King Emperor* [1], the omission vitiates the trial of the petitioner. The conviction of the petitioner is therefore set aside and he will be retried in accordance with law.

N.T.R. — *Conviction set aside*

Ref. No. 18 of 1940
February 18, 1941
BURN & HAPPELL, JJ.
EMPEROR
v.
CHITRAVELU THEVAR & others.

Cr. P. C. (V of 1898), S. 289—Duty of judge—Penal Code, s. 395—Illegal distraint—Recovery from—Offence.

Accused 1 and 3 who were pattadars holding ryoti lands in the zamindari were in arrears with their rent and when the estate authorities went and distrained their cattle, the two accused along with the other six accused forcibly rescued the cattle inflicting injuries upon the estate servants. All the accused were charged under s. 395, Penal Code. On the evidence adduced there was no proof that the inspector who wrote out the distraint notices had any authority to make the distraint. There was also no proof of the exchange of patta and muchilika between the zamindar and accused 1 and 3, or of the continuance in existence of a valid patta and it also appeared that the estate officials' were attempting to recover arrears of more than one fasli by means of a single distraint. The sessions judge disagreeing with a verdict of guilty by the jury made a reference under s. 307, Cr. P. C.

Held, *(1) that the distraint was wholly illegal and the first and third accused*

1. [1923] M.W.N. 477 ; 46 Mad 449 F.B.

could not be said to be acting dishonestly when they went to recover their cattle nor could the other accused who were helping them to recover their own property illegally distrained be considered to be acting dishonestly and that therefore no offence of theft, robbery or dacoity was made out;

(2) that on the evidence recorded, the sessions judge ought to have directed the jury under s. 289 (2), Cr. P. C. to return a verdict of not guilty;

(3) it was the judge's duty and not of the jury to find whether there had been a valid distraint or not, whether the cattle had been illegally taken away and whether the accused acted dishonestly.

Reference under s. 307, Cr. P. C., 1898, by the Assistant Sessions judge of the court of session of the Ramnad division at Devakottai in C. C. No. 130 of 1940.

Accused not represented.
Public Prosecutor (V. L. Ethiraj) for Crown.

JUDGMENT.

(BURN, J.)

This is a reference by the learned assistant sessions judge of Devakottai against the verdict of the jury in Sessions Case No. 130 of 1940. The charge against the accused was for an offence of dacoity under s. 395, I. P. C. but the dacoity was one in a very technical sense. There were eight persons put up for trial before the learned assistant sessions judge. Two of them accused 1 and 3 were alleged to be pattadars holding ryoti lands in the Zamindari of Ramnad. It was alleged that they were in arrears with their rent, that when the Estate authorities went and distrained their cattle, they and the other six accused came and forcibly rescued the cattle inflicting injuries upon the Estate servants for that end. The accused were therefore supposed to have stolen their own cattle. The theft became an offence of robbery because they were said to have caused hurt to some of the prosecution witnesses in order to the commission of the theft, and since there were more than five jointly concerned the offence became one of dacoity.

The learned assistant sessions judge recorded all the evidence at great length and then charged the jury. He endeavoured to persuade the jury to acquit all the accused persons, but the jury returned a unanimous verdict of guilty. The learned assistant sessions judge disagreed with that verdict and considers that it is grossly unjust and perverse and he has therefore made this reference under S. 307, Cr.P.C.

Although the reference must be accepted, it is quite clear that it need never have been made. On the evidence recorded and the facts stated by the learned assistant sessions judge, he ought to have directed the jury under S. 289 (2), Cr. P. C. to return a verdict of not guilty. As the learned assistant sessions judge states, the distraint of the cattle of the first and third accused would be illegal if it were made by a person unauthorised to make it, if it were made without the prior exchange of *patta* and *muchilika*, or if it were made to recover the arrears of more than twelve months. In this case the Inspector P. W. 1 who wrote out the distraint notices was not proved to have had any authority to make the distraint. There was also no proof of the exchange of patta and muchilika between the zamindar and accused 1 and 3 or of the continuance in existence of a valid patta; and it was also clear that the Estate officials were attempting to recover arrears of more than one fasli by means of a single distraint. In these circumstances it is clear that the distraint was wholly illegal, and the first and third accused could not be said to be acting dishonestly when they went to recover their cattle from the possession of the Estate officials, who were taking them away. Nor could the other accused who were helping them to recover their own property illegally distrained be considered to be acting dishonestly. It is clear therefore that the essential elements of the offence of theft were wanting in this case. Without theft there can be no robbery and of course no dacoity. The learned assistant sessions judge ought to have told the jury that, even if they believed every word that the prosecution witnesses said, the accused were not guilty of any offence

and therefore they must return a verdict of not guilty. Instead of doing that, he charged them at great length discussing before them all the legal elements of a lawful distraint. This must have been extremely confusing to the jury, and it was very unfair on the part of the learned assistant sessions judge. It was his duty, not that of the jury, to find whether there had been a valid distraint or not, whether the cattle had been illegally taken away and whether the accused acted dishonestly.

The verdict of the jury clearly cannot be allowed to stand. We set it aside and direct that the accused in this case be acquitted. They must also be set at liberty forthwith. The learned assistant sessions judge in this matter has also not apparently had the courage to act up to his own convictions. He has said that the verdict of the jury was perverse and unjust and his opinion clearly is that the accused ought not to have been convicted; nevertheless he has kept them in custody ever since the date of the trial, 14th December 1940. They had also been in jail for a considerable period before the trial took place. The learned assistant sessions judge ought to have released them on bail immediately.

N.T.R. /—

Cr. R. C. Nos. 1100, 1101, 1103 & 1104 of 1940

Cr. R. P. Nos. 1045, 1046, 1048 & 1049 of 1940

April 24, 1941

MOCKETT J.

M. S. AYYAR & COMPANY, RAJA STREET, COIMBATORE BY C. R. V. DAS

v.

G. SRINIVASULU NAIDU

District Municipalities Act (Mad. Act V of 1920) *s.* 306 (28) *and by-laws under—Levy of license fee for advertisment—If legal.*

There is no provision in the Madras District Municipalities Act which directly or by implication enables a municipality to levy license fees for advertisements and hence the bye-law providing for the levy of license fees is ultra vires.

S. 306, *Cl.* 28 *only empowers the municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, e.g. as to size and position. A further power to levy license fees in respect of advertisements is not implied in the section. The word 'regulate' in the section does not include levying fees.*

Petitions under ss. 435 & 439, Cr.P.C. 1898, praying the High Court to revise the judgment of the court of the senior bench of magistrates, Coimbatore in B. Cs. Nos. 5329, 5333 of 1939 and B. C. No. 3868 of 1940 respectively.

K. Bashyam Ayyangar & R. Desikan, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

Cr. R. C. 1100 *of* 1940. The petitioner has been convicted and fined by the senior Bench court of Coimbatore for advertising without a license in Coimbatore in two manners, (1) in his bullock cart and (2) by means of a board hung over his roof. Mr. Bashyam Ayyangar argues that the conviction is without jurisdiction because no offence has been committed. That depends on a consideration of the District Municipalities Act. There is an express provision in the Madras City Municipal Act, s. 129-A which was introduced by the amending Act X of 1936 making special provision for taxing advertisements, but the only provision with regard to advertisements to be found in the District Municipalities Act is s. 306, cl. 28. S. 306 says.

> "the council may make byelaws not inconsistent with this Act or with any other law to provide..........
>
> (28) for the prohibition and regulation of advertisements in public streets and parks."

This section is in the same words as s. 349(28) of the Madras City Municipal Act No. IV of 1919. There will be found in s. 306 several provisions relating to licenses, for example, cl. 10 (c) for licensing of builders and surveyors, 18 (c) for licensing and controlling of brokers etc., and 22 (b) for the levy of fees for the use of certain burial and burning grounds. "Licenses and fees" are comprehensively dealt with in Chapter XII, which is so headed. Therein are specified a number of

acts for which licenses are required and for which fees may be levied. But there is no provision there for the granting of any license or levying of fees in relation to advertisements. The learned Public Prosecutor has rested his case entirely on s. 321, which reads as follows :

"(1) Every license and permission under this Act or any rule or byelaw made under this Act shall specify the period, if any, for which, and the restrictions, limitations, and the conditions, subject to which the same is granted, and shall be signed by the executive authority.

(2) Save as otherwise expressly provided in or may be prescribed under this Act, for every such license or permission, fees may be charged on such units and at such rates as may be fixed by the municipal council."

There is a distinction in the Act between "license" and "permission" and "regulating", as an examination of the chapter shows: for examble, under S. 255 a license to use a slaughter house is required but under S. 250 permission is required to establish a factory, I observe too that, although private markets can be regulated by byelaws under Chapter XIV, S. 306 (28) (b), license fees are leviable on them under Chapter XII. Chapter XIV is headed "rules, byelaws and regulations" and Chapter XII, as I have already stated, "license and fees". The Public Prosecutor contends that under S. 306, Cl. 28 the "regulation of advertisements" would include giving permission to advertise and therefore, by further implication, a power to levy license fees. But, although in the Act advertisements *may* be prohibited, I can find nowhere that they are prohibited or permitted only by licenses as in the case of all the other numerous subjects mentioned. Licensing, permitting and regulating are, in my view, distinct matters and are dealt with distinctly and differently, under the Act. The intention of S. 306, cl. 28 seems to me to empower the municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, for example, as to size and position—no doubt a necessary provision in the interests of the appearance of the streets and parks. I do not think—indeed I think it is contrary to a general reading of the Act—that it can be implied that a further power to levy license fees in respect of the advertisements is given. But under the byelaws which are attached to the record, it is expressly provided that fees shall be levied. "Regulate" according to the Oxford Dictionary, means "to control by rule, subject to restrictions, moderate, adapt to requirements". It does not seem possible to stretch this meaning to include levying fees, especially when such elaborate provision is made in other parts of the Act for this purpose with regard to other specified matters. What the true meaning and sense of "regulate" in this Act is can be derived from its use in s. 306(2) (3-B), (9) (10-A), (11) (12) (18-B) (22-A). It is a general principle that any provision by which a member of the public may be taxed should be clearly stated; so should in my view, an analogous provision by which any payment can be compelled from them.

My conclusion is therefore that neither directly nor by implication is there any provision in this Act to enable a district municipality to levy license fees for advertisements any more than in the City Municipal Act before the introduction of the amending Act of 1936, which provided especially for taxation of advertisements. It is for the legislature to deal with this omission if it thinks fit. The byelaw therefore appears to be *ultra vires*, and in consequence this revision petition will be allowed, the conviction set aside and the fine, if paid, refunded.

Cr. R. C. Nos. 1101, 1103 & 1104 *of* 1940: The learned Public Prosecutor agrees that my order in Cr. R. C. 1100 of 1940 applies to these cases, and the order will be the same.

N.T.R. — *Petitions allowed*

Cr. R. C. Nos. 442 & 443 of 1941
Cr. R. P. Nos. 418 & 419 of 1941
May 2, 1941

SIR LIONEL LEACH, C.J. & GENTLE, J.

S. SUBRAMANIA SARMA & others
v.
EMPEROR

Criminal trial—Advocate co-accused—If can appear on behalf of co-accused.

An advocate who is accused with others of a criminal offence cannot appear at the trial as counsel for his co-accused. R. 82, Criminal Rules of Practice does not authorise a co-accused to appear as counsel in the case.

Counsel cannot appear in the same matter both as counsel and party. There is no objection to an advocate who is accused of a criminal offence or is a party in a civil court conducting his own defence. But he cannot be in court in the same matter in two capacities.

Petitions under Ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the order of the third Presidency Magistrate of the court of the Presidency Magistrates, Egmore, Madras, dated 26—4—1941 and made in C. C. No. 6 of 1941.

K. Bhashyam, S. Suryaprakasam, S. Viswanathan, B. Jagannadha Das & P.S. Kailasam, for Petrs.

Crown Prosecutor (P. Govinda Menon), for Crown.

ORDER

SIR LIONEL LEACH, C. J. These criminal revision petitions raise the question whether an advocate who is accused with others of a criminal offence can appear at the trial as counsel for his co-accused. The petitioner in Cr. R. C. No. 443 of 1941 is a member of the English Bar and has been enrolled as an advocate of this Court. He and six others, two of whom are the petitioners in Cr. R. C. No. 442 of 1941, are accused of having been parties to a criminal conspiracy, the object of which was *inter alia* to commit or abet the commission of certain illegal acts by the public generally or by a class of persons exceeding ten. The illegal acts are specified in the charge-sheet. They number six. It will be sufficient to quote the first and the last of these allegations:

"(1) influencing the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of the war.

"(6) To unite into one organisation the extremist elements in India, revolutionaries, labour and other unions with the object of setting up a State which would be controlled by the workers and peasants."

The proceedings commenced on the 14th March of this year before the Third Presidency Magistrate The court sat *de die in diem* from the 14th March until the 24th April, when the second and fourth accused (the petitioners in Cr. R. C. No. 442 of 1941) fell ill. On the 25th April the first accused filed a memorandum stating that he had been instructed to appear on behalf of the second and fourth accused and that he wished to enter an appearance on their behalf. The magistrate considered that it would be improper to allow him to do so and consequently refused permission. His order has led to the filing of the applications now before the court.

The accused are all in custody and have been in custody throughout. The court is asked to sanction the first accused stepping from the dock to the place reserved for counsel and appearing there as counsel for two of his co-accused. It has been suggested by Mr. Bhashyam Ayyangar, who appears on behalf of the first accused, that there could be no objection to the first accused being in the dock a part of the time and in counsel's seat for the remainder of the time. This is a startling proposition. I have no hesitation in holding that the Magistrate has passed a correct order. Counsel cannot appear in the same matter both as counsel and party. There is no objection to an advocate who is accused of a criminal offence or is a party in a civil court conducting his own defence or his own case. He is fully entitled to do so. But he cannot be in court in the same matter in the two capacities. Mr. Bhashyam Ayyangar has not been able to produce any authority in support of the proposition that the first accused should be allowed to appear before the third Presidency Magistrate for his co-accused, and this is not surprising. There is, however, authority that the first accused cannot be allowed to appear as counsel for

his co-accused. In *New Brunswick and Canada Railway Co.* v. *Conybeare* [1] the respondent was a barrister. On the first day of hearing the leading counsel for the respondent suggested that the respondent might appear as his junior in the cause. The Lord Chancellor (Lord Westbury) said:

> "Certainly; But not both as party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two characters."

In *Newton* v. *Chaplin*[2] the Court of Common Pleas held that a barrister, who was a party in an action, civil or criminal, is in the same position as any other party. Wilde, C. J. observed:

> "I do not think that a party in a civil or criminal case, who is also counsel, is in a different position from any other party. In a criminal matter, a party would not be entitled to sit in wig and gown among the Bar as his own counsel."

It is abundantly clear that the first accused cannot be allowed to appear as counsel in the proceedings before the magistrate.

It has been said, and I do not doubt it, that these petitions have been filed because it would facilitate an early disposal of the case, if the first accused were allowed to appear on behalf of the two accused who have fallen ill. The question however is not one of expediency, it is one of principle. R. 82 of the Criminal Rules of Practice states that criminal courts should, as a rule in cases where there are more accused than one, permit one of them to be authorised by another to appear, plead or act for him in the proceeding, provided the authority is in writing and signed or contains the thumb impression of the party giving it and is filed in court. The application to the magistrate was not made under this rule. In fact the court has been informed that it was expressly stated to the magistrate that the application made by the first accused to be allowed to appear as counsel for the second and fourth accused was not intended to be made under this rule. If and when any such application is made it will be heard, but this rule certainly does not authorise a co-accused to appear as counsel in the case.

1. 9 H.L.C. 711: 11 E.R. 907
2. 19 L.J. (C.P.) 374

For these reasons I consider that these petitions should be dismissed.

GENTLE, J: I agree and have nothing to add.

N.T.R. — *Petitions dismissed.*

Cr. R. C. No. 344 of 1940
Cr. R. P. No. 333 of 1940

September 27, 1940

LAKSHMANA RAO, J.

AGASTHYALINGA GOUNDAN
v.
EMPEROR

Penal Code (*XLV of* 1860), *S.* 304-*A*—*Poisonous medicine mistaken for arrack by servant—Death—Offence.*

Where the accused kept a bottle of the 'Atlas tree killer' in his farm-shed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence,

Held, *the accused could not be prosecuted under S.* 304-*A, Penal Code.*

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to quash the charge framed by the court of the sub divisional magistrate of Erode dated 9—4—1940 in C. C. No. 24 of 1940.

K. Desikachari, for Petr.
Public Prosecutor (*V.L. Ethiraj*), for Crown.

ORDER

The accused had kept a bottle of the 'Atlas tree killer' in his farm-shed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence. This can hardly warrant a prosecution under S. 304 (A), I.P.C. and the charge framed against the accused is quashed.

N.T.R. — *Petition allowed.*

Cr. R. C. No. 1 of 1941
Cr. R. P. No. 1 of 1941
July 16, 1941
HORWILL J.

Periya YELUMALAI CHETTI & others
v.
EMPEROR.

Gaming Act (*Mad. Act III of* 1930), *S.* 3—*Common gaming house—Recovery of papers relating to horse races—Presumption.*

A *house in which wagering or betting on horse race takes place is a common gaming house within S.* 3, *Gaming Act.*

Where a large variety of papers were found in the house relating to horse racing and a number of persons were found actually making betting calculations,

Held, *in view of S.* 6, *the conclusion that the house was used as a common house could be drawn.*

Obiter: *The fact that some of the accused were in the house calculating what was due by or to various persons as a result of the betting on horse races only shows that these persons were present in that house for the purpose of assisting the persons who were conducting the betting, but not that they themselves were actually gaming and they would be guilty under S.* 8 *rather than under S.* 9.

Petition under Ss. 435 & 439 Cr. P. C., 1898 praying the High Court to revise the judgment of the court of the sub Divisional Magistrate of Trivellore dated 31—12—1940 and passed in C. A. No. 57 of 1940 (C. C. Nos. 1461 to 1479 on the file of the Court of the stationary sub magistrate, Ponneri).

T. R. Venkatarama Sastri, F. S. Vaz, K Seshagiri Rao Naidu & N. Krishnamurthi for petrs.
Public Prosecutor (*V.L. Ethiraj*), for Crown.

ORDER

The Inspector of Police, Ponneri, who was examined as P. W. 1 in this case, obtained a warrant from the Deputy Superintendent of Police under S. 5 (1) of the Madras Gaming Act (III of 1930) to search the house belonging to the first and the second accused. He went to that house and saw two persons lying inside the door and others busy writing somthing. He posted a constable and a bus conductor to see that nobody ran away and went to the front of the house. There he found the first and the third accused keeping watch. He knocked on the door and it was opened by the second accused after the first and the third accused had called to those inside. The Inspector entered the house and found accused 6 and 9 lying down on the pial while others were busy writing slips of paper. He made a search and amongst other things found a large number of papers of various kinds relating to the business of betting on horse-racing. He made out a charge sheet, and on his evidence the stationary sub magistrate of Ponneri has found the first and the second accused guilty under s. 4 (1) and accused 4 to 19 guilty under s. 9 of Madras Act III of 1930. All the convicted accused have filed this revision petition.

The principal point argued in this petition is whether the house that was searched and raided was a 'common gaming house' within the meaning of the definition found in s. 3 of that Act. The main part of the section no doubt reads as if it did not apply to horse-racing, because it refers to a 'room or place in which cards, dice, tables or other instruments of gaming are kept or used'; such expressions being hardly applicable to the slips drawn up in connection with betting on horse racing. But the second paragraph of that section, which is found only in this Act of 1930, says that "gaming.......includes wagering or betting on a horse race . . . ." That being so, one must conclude that a house in which wagering or betting on horse race takes place is a common gaming house.

The objection to the above conclusion is the wording of Ss. 4 (i) and 4 (ii), which undoubtedly does suggest that s. 4 was intended to deal with gaming on a horse race alone—thus suggesting that the rest of the Act applied to gaming other than gaming on horse races. The learned Public Prosecutor has however pointed out that it is not necessary to draw this conclusion. s. 4 (ii) makes liable to punishment any

person found gaming on a horse race, the wording of this sub section being entirely different from that of any other provision of the Act dealing with gaming in general. s. 4 (i) is worded very much the same as s. 8, and it has therefore been argued that if s. 8 applies to horse facing also, s. 4 (i) would be redundant; but for some reason not very clear, the punishment awarded in s. 4 (i) is different from that for gaming in general under s. 8. It cannot be said therefore that the wording of ss. 4 (i) and 4 (ii) makes it impossible to apply the definition of a common gaming house to a house in which wagering or betting on a horse race takes place. The apparent reason for this difficulty in construing the Act as a whole arises from the fact that Act III of 1930 is based on an older Act of 1890, the wording of which has to a great extent been embodied in Act III of 1930, insufficient care having been taken in the grafting of the new provisions on to the old Act.

The importance of the point whether a 'common gaming house' can be applied to a house in which betting on horse racing takes place relates to s. 6, for under that section 'cards, dice, gaming table or cloth board or other instruments of gaming' are evidence that such place is used as a common gaming house: so that if the house in question was a common gaming house, the mere fact that papers relating to horse racing were found inside would in itself be evidence that the house was being used as a common gaming house and that all the persons found therein were present for the purpose of gaming.

It is argued on the authority of *Benoy Krishna Roy* v. *Emperor* [1] that the mere fact that certain papers relating to horse racing were found inside the house in question is not sufficient, even if we make use of s. 6 of Act III of 1930, to warrant a conclusion that the house was used as a common gaming house. In the present case a large variety of papers were founded in the house relating to horse racing, and, above that, a number of persons were found actually making betting calculations. It is possible to conceive of cases where a person may have a common gaming house in one place and then take to his private house certain books when the day's proceedings are over. In such a case his private house would not be a common gaming house; but in the present case all the circumstances point to the fact that this house was used as a common gaming house. It is of course possible, as has been argued, that the betting actually took place somewhere else and that the slips and other papers were taken away to the house searched after the business was over and that the only purpose for which the house itself was used was for calculatfng the results of the bets and determining to whom money was due. I think it however more reasonable to draw the conclusion the learned magistrate did, especially in view of the provisions of S. 6, which enables a court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia of betting were found in it. There is no evidence which points to or suggests a contrary conclusion.

The facts found by the lower court were that the first and second accused were keeping a common gaming house and that the petitioners were in that house for the purpose of gaming. So far as the first and the second accused are concerned, there can be no doubt that this finding was correct. The fact that the other accused were in this house calculating what was due by or to various persons as a result of the betting on horse races only shows that these persons were present in that house for the purpose of assisting the persons who were conducting the betting; but not that they themselves were actually gaming. Despite the fact that the presence of the other accused is evidence under S. 6 of the Act that they were there for the purpose. if I were trying the case myself, I would be inclined to find the other accused guilty under S. 8 rather than under S. 9: but I do not consider that this is a sufficient reason for interfering with the conviction or the

1. [1941] A.I.R. Cal. 32

sentences imposed by the trial magistrate. The appellants, who have been fined only Rs. 75, in the case of accused 1 and 2, and Rs. 50 in the case of others, may be considered to have got off lightly. The petition is accordingly dismissed.

N.T.R. *Petition dismissed.*

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Cr. M. P. No. 765 of 1941

July 4, 1941

SOMAYYA, J.

N. M. V. VELLAYAPPA CHETTIAR
v.
ALAGAPPA CHETTIAR

Cr. P. C. (V of 1898*), ss.* 87 *&* 88 — *Warrant under — Requisites.*

It is a condition precedent under s. 87, *Cr. P. C. for the issue of a proclamation that the accused should have absconded or should be concealing himself. It is also a condition precedent for the issue of attachment under s.* 88.

Where a person had left India months before, an order for attachment and proclamation under ss. 87 *and* 88, *Cr. P. C. is without Jurisdiction.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the order of attachment of the petitioner's properties in C. C. No. 598 of 1941 on the file of the court of the Additional Sub-Magistrate of Tirupathur (Ramnad Dt.).

N. Sivaramakrishna Iyer, for Petr.
A. S. Sivakaminathan, for Crown.

ORDER

The Public Prosecutor showed me a copy of the amin's return of the warrant which was issued for the arrest of the second accused. That return mentioned that the amin was informed that the second accused had gone to Epoh. Epoh is in the Federated Malaya States, and according to the affidavit filed on behalf of the petitioner he left India in March and that is not contradicted by the complainant in the affidavit which he has filed today before me. What is said is that he originally preferred a complaint on 1—2—1941, that the magistrate forwarded the same to the police for enquiry, that the court took it on file ultimately and that in the month of April the complainant got information from the magistrate that he had already issued notice to the accused on the police report. The complainant states further that on one day, which is said by the petitioner's advocate to be 31—5—1941, the complaint was dismissed on the ground that the complainant was absent when called. A fresh complaint was filed on 2—6—1941, and it is on this fresh complaint that the warrants of attachment and proclamation were issued on 20—6—1941. It is obvious that when the magistrate was informed that the petitioner had already left India, the orders for attachment and proclamation are without jurisdiction, unless he was satisfied that the accused was wilfully absconding, knowing of the warrant. He could not have known of the warrant which was issued after he had left India. When it was clear that the accused had left India in March it could not possibly be said that he absconded or that he is concealing himself so that the warrant cannot be executed, which is a condition precedent under s, 87, Cr. P. C. for the issue of a proclamation. It is also a condition precedent for the issue of attachment under s. 88. It was at first said that the petitioner was still in India and that he is concealing himself somewhere in India. If that is so, the action of the magistrate would be perfectly justified. I asked the complainant whether he would state so in an affidavit and I gave him an opportunity of stating it in an affidavit. In the affidavit filed by him, he has not contradicted the statement made on behalf of the petitioner that he left India in March. Under these circumstances I hold that the orders of proclamation and attachment are without jurisdiction and as such they are set aside.

N.T.R. *Order set aside.*

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CR. R. C. No. 312 OF 1940
Cr. R. P. No. 301 of 1940

November 1, 1940.

LAKSHMANA RAO, J.

Nandarapu MAHALAKSHMI NAIDU
v.
Kalangi SATYAM & others.

Cr. P. C. (V of 1898*), S.* 147*—Mandatory order against person not party.*

Where a dam was constructed by a person who was not a party to the proceeding under S. 147 *to which the agent alone was made a party and the agent died pending enquiry,*

Held, *an order under S.* 147, *Cr.P.C. to remove the dam cannot be issued, though it be found to be an obstruction to the right of the petitioners.*

FACTS: The case arose out of a petition filed by a jeroyati tenant under S. 147 Cr. P. C. The joint magistrate found that the dam complained of was a high-handed construction affecting adversely the right to water of the petitioners and said, "The next point for consideration is whether this court can order the counter-petitioners in the present case to order the removal of the dam. It is the contention of the counter petitioners that the dam was put up by the mokhasadarini, through her agent C. P. W. 3, who also made a written order ordering the construction of the dam, Ex. V. His evidence that the dam was constructed by the mokhasadarini at her expense has not been rebutted. The mokhasadarini was not a party to these proceedings. C. P. 10 was her Estate Revenue Inspector. There is some doubt whether he may be ordered to remove the dam. In *Nagoji Rao* v. *Subbarayudu Naidu* (5 L. W. 118), it was held by our High Court that an order passed under S. 145, Cr. P. C. against servants without their master being on the record is one without jurisdiction, and liable to be set aside in revision. To make matters simpler, counter petitioner 10 is now no more, having passed away during the trial of this case. So there is no party on record against whom a mandatory order directing the removal of the obstruction can be passed. In *Maya Devi* v. *Diwan Chand*, it was clearly held by a Division Bench of the Lahore High Court (A. I. R., 1935, Lah. 115), that a person who is not a party to the proceedings under s. 145, Cr. P. C., cannot be held to be a person bound by the order of the magistrate.

"While therefore finding that the petitioner has some rights in the water of the Gorregeeda at the point of the dam, and that this right is at least an one-fourth share of the waters at that point, and that the offending dam is an obstruction to the clear right of user of the petitioner, and that in other circumstances he would be entitled to an order for its removal, I have also to find that the person who is responsible for the putting up of the dam is not a party on record, and that I cannot therefore pass an order directing its removal. The petitioner's only remedy seems to me to be through a civil court, after impleading all the necessary parties. I have purposely refrained herein from giving any finding as to the precise share of the water at the point of the dam as between Teetigala cheruvu and the jeroyati lands of Chintaluru, as that is a matter which can more properly be adjudicated upon by a civil court." Against that order the present revision was filed on the ground "the magistrate erred in thinking that because the mokshadarini was not a party to the proceedings by name the order could not be issued."

Petition under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the Court of the Joint-Magistrate of Narasapatnam dated 31—1—1940 and made in M. C. No. 3 of 1939.

B. Jagannadha Das, for Petr.
B. V. Ramanarasu & *V. Govindarajachari*, for Respts.
Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The dam in question was constructed by the mokshadarini who was not a party to the proceeding, and her agent the tenth counter-petitioner died before the completion of the enquiry. An order to remove the dam cannot therefore be issued, though

it is found to be 'an obstruction to the clear right of user of the petitioner of the water of the Gorregedda at the point of the dam to at least one-fourth share of the waters at that point' and the revision petition is accordingly dismissed.

N.T.R. — *Petition dismissed*

Cr. R. C. Nos. 1102 & 1105 of 1940
Cr. R. P. Nos. 1047 & 1050 of 1940

December 17, 1940

LAKSHMANA RAO, J.

BALARAMA MUDALI & others
v.
EMPEROR

General Clauses Act, (X of 1897*), s.* 26—*Conviction under s.* 3 (12), *Town Nuisances Act and s.* 352, *I. P. C.—Sentence.*

Where in respect of the same acts petitioners were convicted under s. 3 (12) *of Act III of* 1899 *and s.* 352, *I.P.C.*

Held, *as the acts constituting the offence were the same they should not be punished twice over.*

Petition under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the orders of the court of the 1st class bench of magistrates, Sriperumbadur dated 31-10-40 and made in B. C. Nos. 313, 314, 315 and 316 of 1940.

P. B. Annangarachari, for Petrs.
K. Venkataraghavachari, for Crown.

ORDER

There is no ground for interference with the convictions of the petitioners under s. 3, cl. 12 of Act III of 1889 and s. 352, I. P. C., but the acts constituting the offences are the same and the petitioners cannot be punished twice over. The sentence of the petitioners under s. 3 cl. 12 of Act III of 1889 is therefore set aside, and having regard to all the circumstances, the fine of the petitioners under s. 352, I.P.C. is reduced to Rs. 5 each with simple imprisonment for two weeks in default. The order under s. 106, Cr. P. C. against the first petitioner is also set aside and otherwise the petitions are dismissed.

N.T.R. — *Petitions dismissed*

Cr. R. C. No. 387 of 1940
Case Referred No. 10 of 1940

October 23, 1940

LAKSHMANA RAO, J.

Maki NANJI REDDI & others
v.
NARASAMMA

Cr. P. C. (V of 1898*), S.* 209—*Magistrate finding he has no jurisdiction—Procedure.*

Where a magistrate finds that he has no jurisdictian to try the case, he should submit the records for transfer to the court of competent jurisdiction, and cannot discharge the accused.

FACTS: The stationary sub magistarate, Kadiri discharged the accused under Ss. 209 (2) and 185 (1) Cr. P. C. on the ground that he had no jurisdiction to enquire into the case. The district magistrate made the reference under s. 438 Cr. P. C. on the ground that the order of the magistrate was incorrect, being of the opinion that the magistrate when he found he had no jurisdiction to try the case should have submitted the records for transfer to the court of competent jurisdiction.

Case referred for the orders of the High Court under s. 438, Cr. P. C. by the District Magistrate of Anantapur in his letter dated 27—4—1940 C. M. P. No. 5 of 1940.

R. Krishna Sastri, for Accused.
P. S. Kailasam & N. Somasundaram, for Complt.
Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

The reference is accepted. The order of the stationary sub magistrate of Kadiri dated 16—2—1940 and made in P. R. C. No. 3 of 1940 is set aside and he is directed to return the complaint to the complainant for presentation to the proper court.

N.T.R. —

R. T. No. 55 of 1941
Cr. App. No. 324 of 1941
June 2, 1941
WADSWORTH & SOMAYYA, JJ.

PERIA GURUSWAMI GOUNDER & another
v.
EMPEROR

Criminal trial—Eye-witness not examined by prosecution—Procedure—Evidence Act (I of 1872), s. 27—Joint statement by two accused—Admissibility.

When there is an important eye-witness whom the Public Prosecutor does not wish to examine, because he has been treated as hostile in the committal enquiry, the proper course to take is for the Public Prosecutor to see that the witness is present in court, and for the court, if the witness is really important, to examine that witness as a court witness and allow both sides to cross examine the witness.

Where two accused presented themselves at a police station shortly after the occurrence and handed over two weapons to the police officer and a report was drawn up which was a summary of a joint statement made by both the accused implicating them in the crime.

Held *(1) that S. 27, Evidence Act had no application to the confessional statement made to the police officer before the deponent had come into the custody of that police officer;*

(2) that the joint statement could not be treated as the individual statements of the two accused; and

(3) that the statement should have been excluded from evidence, though it could have been used by the police officer to refresh his memory as to the date and time when the accused appeared before him.

Trial referred by the court of session of the Tinnevelly division for confirmation of the sentences of death passed upon the said prisoners in C. C. No. 156 of 1940 on 8-3-1941 and appeal by the prisoners against the said sentences.

K. S. Jayaram, for Accused.
Public Prosecutor (V.L.Ethiraj) for Crown.

JUDGMENT
[WADSWORTH J.]

The accused in this case have been convicted by the learned sessions judge of Tinnevelly of an offence under s. 302 I. P. C. It is alleged that they on the 23rd March 1940 at Ottudanpatti, a village in the Koilpatti taluk, murdered one Sangili Thevar. Prosecution evidence is that the deceased was attacked in the street at about 3 P. M. by the two accused, the first accused holding him while the second accused cut him, and that this was done in the presence of three eye-witnesses—P. W. 3 a man of the village, one Sanga Reddiar who has not been examined by the sessions judge and is also a man of the village, and P.W. 4 a man who lives some four miles away and happened to be present. The deceased received a large number of injuries and died before the arrival of the village munsif. The village munsiff heard of the occurrence when in a hamlet a mile and a half away and he is said to have been there by 4 P. M. and hearing that P. W. 3 was a witness he sent for him and took a complaint from him which is alleged to have been despatched at 6 P. M. and to have reached the police station, which we are told is eight miles away, at 9-30 P. M. The two accused are alleged to have appeared before a constable at a police outpost a mile away at 4-30 P. M. and to have handed over two weapons, an aruval and a knife, neither of which were found by the chemical examiner to be stained with blood. As we think it desirable to send this case back for retrial we do not propose to say anything which will affect the merits of the case. We will deal only with the two main criticisms of the trial by the learned sessions judge.

Firstly there is the fact that Sanga Reddiar, who was undoubtedly one of the three eye-witnesses, was not examined in the sessions court on the ground that he was treated as hostile by the prosecution with the permission of the committing magistrate. It is undoubtedly difficult to lay down any rule of universal application in such cases. It may be said that the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evi-

dence hostile to the prosecution in the lower court. At the same time it does seem to us to be the duty of the court when there is an important eye-witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal enquiry, to record the evidence of this witness and that the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances seems to us to be for the Public Prosecutor, to see that the witness is present in court and for the court, if the witness is really important, to examine that witness as a court witness and allow both sides to cross-examine the witness. We do feel in the present case, which depends on the evidence of the three eye-witnesses, that those three eye-witnesses should have been examined in the sessions court and, if the Public Prosecutor is reluctant in the circumstances of the case to put forward Sanga Reddiar as a witness on behalf of the prosecution, there seems to be no reason why he should not have been examined as a court witness.

The other criticism relates to Ex. E. Ex. E purports to be a report by the constable on duty at the out-post at which the accused are alleged to have presented themselves shortly after the occurrence and handed over two weapons. This report contains what is alleged to be a summary of a joint statement made by both the accused to some extent implicating them in the crime. A portion of this statement has been treated as admissible by the sub magistrate apparently under the impression that it falls under S. 27 of the Indian Evidence Act. So far as one can gather, the sessions judge has marked the whole of the report including this joint statement. It appears to us that S. 27 of the Indian Evidence Act has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. Moreover, it seems to us improper to treat as the individual statements of two different persons a composite statement of this kind, which appears to have been made up of information gathered from the two persons, it being impossible to say how much of the statement was made by one of them and how much was made by the other. No doubt Ex. E could properly have been used by the constable to refresh his memory as to the date and time when the two accused appeared before him and handed over the two weapons. We do not consider that it should have been used for any other purpose. In fact it has been mainly used by the learned sessions judge to throw light on the motive for this crime. In our opinion, it should have been excluded from evidence.

In view of these two defects in the trial, namely, the failure to examine Sanga Reddiar and inclusion of this inadmissible document, Ex. E, we think it desirable to order a fresh trial. The convictions and sentences are therefore set aside and the case will be remanded for re-trial by the additional sessions judge of Tinnevelly.

N.T.R. — *Conviction set aside*

Cr. R. C. No. 966 of 1940
Cr. R. P. No. 919 of 1940

January 31, 1941

LAKSHMANA RAO, J.

Srikolanu SESHA REDDI
v.
Srikolanu NARASIMHA REDDI & others

Cr.P.C. (*V of* 1898), *Ss*. 145 & 146—*Temple properties — Dispute as to trusteeship — Petition under s*. 145—*Receiver appointed for properties under s*. 146—*H.R.E. Board appointing a trustee—Trustee applying to magistrate for possession of property*.

Where a dispute existed as regards trusteeship of a temple and the magistrate on a petition under s. 145 *Cr.P.C. appointed a receiver of the property and the H. R. E. Board appointed a trustee and the magistrate refused to hand over the properties to the trustee,*

Held, *that the order cannot be sustained and the lands under attachment with the receiver must be restored to the trustee.*

FACTS:—There was a dispute as regards the trusteeship of Chennakeswaraswami temple at Koppolu village, Ongole Taluk. A petition was filed before the Joint Magistrate, Ongole, under s. 145, Cr. P. C. and the magistrate appointed a receiver under s. 146, Cr. P. C. and handed over the properties to him till a competent authority decided the dispute. The Hindu Religious Endowments Board after enquiry appointed the petitioner as the hereditary trustee of the temple. Then the petitioner filed a petition before the joint magistrate for possession of the property and the income therefrom being handed over to him. The joint magistrate rejected the petition on the ground that a mere declaration that the petitioner is the trustee of the temple is not enough and that he must get declaration that he is also entitled to the possession of the property.

This revision was filed from that order.

Petition under ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the joint magistrate of Ongole dated 7—10—1940, and made in M. C. No. 27 of 1933.

N. Subramanyam, for Petr.

Public Prosecutor (*V. L. Ethiraj*), for Crown

ORDER

The petitioner has been declared to be the trustee and the order of the Joint Magistrate cannot be sustained. It is accordingly set aside and the lands under attachment will be restored to the petitioner.

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Cr. R. C. No. 430 of 1940
Case Referred No. 16 of 1940
September 27, 1940
LAKSHMANA RAO, J.

EMPEROR
v.
MOTTAIYAN *alias* Perumal and another

Cr. P. C. (V of 1898*), s.* 349 (1) *(A)* — *Procedure under.*

The sub-magistrate found two accused guilty of offences under ss. 454 *and* 380, *I. P. C., but as one of them was a juvenile, he submitted the case and records to the sub divisional magistrate so far as A*-1 *was concerned but imposed sentence on A*-2.

Held, *that the procedure adopted by the sub magistrate was illegal and that under S.* 349 (1) *(A) Cr. P.C. the sub magistrate ought to have submitted the records to the sub divisional magistrate in respect of both the accused.*

FACTS: The sub magistrate, Ariyalur held an enquiry in C. C. 76/40 on his file against M and H for an offence punishable under Ss. 454 and 380 I. P. C. He held both the accused guilty and convicted and sentenced A-2. to six months' rigorous imprisonment. As A-1 was a juvenile, he submitted the case records to the sub divisional magistrate, Ariyalur under S. 5 (1) of Act IV of 1920, since he was not empowered to deal with A-1. A-1 was dealt with under S. 28 (b) of Act IV of 1920 by the sub divisional magistrate, Ariyalur in C. C. 88/40. The second accused preferred an appeal from the conviction and sentence of the sub magistrate, Ariyalur to the sub divisional magistrate, Ariyalur. The district magistrate submitted the records under S. 438 Cr. P. C. to the High Court holding that under S. 349 (1) (A) Cr. P. C. the sub magistrate ought to have submitted the records to the sub divisional magistrate for passing sentence on both of the accused, instead of sending A-1 alone to him for being dealt with under S. 5. (1) of Act IV of 1920 and himself sentencing A-2 to rigorous imprisonment, that the provisions of S. 349 (1) (A) were mandatory and that the procedure adopted by the sub magistrate was illegal.

Case referred for the orders of the High Court under S. 438 Cr. P. C. by the District Magistrate of Trichinopoly in his letter dated 18—6—40.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The Reference is accepted. The conviction and sentence of the second accused are set aside and the sub magistrate of Ariyalur is directed to forward the second accused also to the sub divisional magistrate as required by s. 349 (1-a) Cr. P. C.

N.T.R.

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Cr. R. C. No. 259 of 1941
Cr. R. P. No. 245 of 1941
July 24, 1941.
HORWILL J.

A. S. SEHU MUHAMMAD MARAIKAYAR
v.
EMPEROR

Local Boards Act (Mad. Act XIV of 1920*), s.* 229*—Abuse of bill collector after service of notice—If molestation.*

S. 229, *Local Boards Act, does not make all molestation punishble, but only molestation of a person in the performance of his duty. It does not make punishable a molestation* during *the course of the performance of the duty but in the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work.*

Petitioner was convicted under s. 229, *Local Boards Act for having uttered offensive abuse on the occasion of a demand for tax being presented to him by the bill collector of the panchayat board. The person abused was not the bill collector but some unnamed person inimically disposed towards the petitioner who had given information leading to enhanced assessment. In revision.*

Held, the petitioner could not be convicted under s. 229, *Local Boards Act.*

The word 'molest' carries with it some suggestion of interference or restraint or obstruction.

The definition of molestation as given in Ordinance No. V *of* 1932 *which was drawn up in connection with the boycott of* 1931-32 *conveys what seems to be the essence of molestation.*

Petition nnder ss. 435 & 439 Cr.P.C. 1898, praying the High Court to revise the judgment of the court of the sub divisional 1st class magistrate of Tinnevelly in C.A. No. 42 of 1940 preferred against the judgment of the court of stationary sub magistrate of Tiruchandur dated 25—11—1940 and passed in C. C. No. 1362 of 1940.

S. Ramachandra Iyer, for Petr.
Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER.

The petitioner was convicted by the Second Class Magistrate of Trichendur of an offence punishable under s. 229 of the Local Boards Act for having uttered offensive abuse on the occasion of a demand for tax being presented to him by the complainant, a bill collector of the Panchayat Board of Kayalpatnam. He was fined Rs. 15 and the conviction and sentence were affirmed on appeal to the Sub Divisional First Class Magistrate of Tinnevelly.

The learned advocate for the petitioner contends that even though it was true that the petitioner uttered the abusive language complained of, it would not be an offence punishable under s. 229 of the Local Boards Act. s. 229 runs thus:

> "No person shall obstruct or molest a local Board or any person employed by the local board......in the performance of their duty or of anything which they are empowered or required to do by virtue or in consequence of this Act or of any by-law rule, regulation or order made under it."

It was contended by the prosecution that the bill collector was molested. The word 'molest' to my mind carries with it some suggestion of interference or restraint or obstruction: but that is not the ordinary dictionary meaning. The Oxford Dictionary does give a meaning of this kind, 'to interfere or meddle with (a person) injuriously or with hostile intent': but it adds that this meaning is almost exclusively used in negative contexts. The positive meaning would seem to be 'subject to intentional annoyance': in which case it might be said that the accused did molest him. This meaning is sometimes used in English Law; for example, a woman is said to molest a man within the meaning of the 'Bastardy Act' if she falsely imputes to him that he is the father of her illegitimate child: and a creditor who is a signatory to a deed of agreement is said to molest a debtor if the agreement is broken by his bringing an action against the debtor for a debt included in the deed. It is of some interest that a definition of 'molestation' is given in Ordinance No. V of 1932, which was drawn up in connection

with the boycot of 1931/32, and the principal part of that definition was that a person is said to molest another person who

> "with a view to cause such other person to abstain from doing or to do any act which such other person has a right to do, or to abstain from doing, obstructs or uses violence to, or intimidates such other person or anyone in whom such person is interested, or loiters at or near a house where such a person or anyone in whom such person is interested, resides or works or carries on business or happens to be or persistently follows him from place to place or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof."

This definition conveys what, in my opinion, seems to be the essence of molestation. However that may be, s. 229 of the Local Boards Act does not make all molestation punishable, but only molestation of a person in the performance of his duty. If, for example, the bill collector had been prevented or hindered in the fulfilement of his duty by this vulgar abuse, I think the petitioner would have been rightly convicted. But it appears that the bill collector went to the house of the petitioner merely for the purpose of serving a demand, and even if he had not been abused by the petitioner he could have done no more than he did. Having served his demand notice, he had nothing to do but to leave again. s. 229 does not make punishable a molestation *during* the course of the performance of the duty but *in* the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty but it must in someway interfere with his work. It is not immaterial to state that the person abused was not the bill collector, but some unnamed person inimically disposed towards the petitioner who had given information leading to an exaggerated assessment.

Although the petitioner would perhaps have merited the fine imposed on him if he had been charged under s. 504 I. P. C., yet the conviction under s. 229 of the Local Boards Act cannot stand and must be set aside. The conviction is therefore set aside and the fine, if paid, ordered to be refunded.

N.T.R. *Conviction set aside.*

S. A. No. 854 of 1937

August 8, 1940

VENKATARAMANA RAO, J.

Srimat Paravastu Pattabhirama China GOVINDACHARYULU

v.

Punyamurthula SESHAGIRI RAO

Tort — Libel — Criminal proceedings — Apology in—Suit for damages, if lies.

A *civil action in tort and criminal proceedings for libel are distinct and different remedies. Any adjustment of the criminal complaint would not operate as an accord and satisfacion of the civil action for damages, unless it was specifically agreed that the compromise in the criminal proceedings should also operate as an accord and satisfaction of the civil action. Accepetence of an unconditional apology given in the criminal case and consequent withdrawal of the criminal proceedings, is no bar to the civil suit for damages for libel.*

Appeal against the decree of the court of the subordinate judge of Rajahmundry, in A. S. No. 47 of 1936 (A. S. No. 136 of 1936 on the file of the district court) preferred against the decree of the court of the district munsif of Rajahmundry in O. S. No. 4 of 1934.

K. Krishnaswami Ayyanger & A. Seshachari, for Applt.

K. Bhimasankaran, for Respt.

JUDGMENT

This second appeal arises out of an action for damages for libel filed by the plaintiff against the defendant in respect of certain allegations made by the latter in writing to the Superintendent of Post Offices concerning an appointment to the branch post office at Vadapalli. This was in December 1932. On the 8th February 1933 the plaintiff sent a notice to the defendant requiring him to tender an unconditional apology within 15 days

of the date of receipt of this notice and threatening a civil or criminal action in case he failed to do so. On the 26th February 1933 the defendant sent a reply stating that the allegations made by him in his petition were not false that he never intended to harm his reputation and that he was sorry that the allegations which he had made should have given rise to any misapprehension in regard to his intention. Of course this was not an unconditional apology as required by the plaintiff. Thereupon the plaintiff filed a criminal complaint. The defendant justified his action and the criminal complaint was dismissed. A revision petition was preferred against the said order and after a lengthy argument addressed by both sides as observed by the sessions judge who disposed of the case, the defendant herein withdrew his allegations against the plaintiff and expressed regret. In view of the unconditional apology the plaintiff withdrew the criminal complaint, and made an endorsement to that effect on the complaint petition. Subsequent to this, some misunderstandings apparently arose and this suit had been filed for damages. In the written statement filed by the defendant he justified his action, pleaded qualified privilege and also alleged that he having tendered an apology in the criminal court, the suit ought not to have been filed. The learned district munsif went elaborately into all the questions and found against the plea of qualified privilege and that the apology was no defence to a civil action in tort and in assessing damages, he observed as follows:

"I do not think that damages to the extent of Rs. 100 should be granted to the plaintiff, because if the defendant acted meanly in sending the petition with a view to cause loss to his enemy and gain to his own relative, the plaintiff acted at least equally meanly in filing the criminal case and more meanly in filing this suit."

He therefore though that the plaintiff was entitled to nominal damages and gave him Rs. 5 for damages and also the costs of the suit. It would have been better if both the parties had contented themselves with this decision, but the defendant chose to file an appeal, against that decision to the learned subordinate judge. The appeal was dismissed and against that dismissal this second appeal has been preferred.

Mr. Krishnaswami Ayyangar for the defendant has urged before me two points: (1) that his client was justified in sending the petition containing the allegations because he was a person interested as a villager in making the complaint to the Postal Superintendent and therefore his client was protected by qualified privilege; and (2) that the unconditional apology given in the sessions court and accepted by the plaintiff who in consequence withdrew the criminal revision petition operates as an accord and satisfaction of the action for damages for libel. In regard to the first point I fail to see what interest the defendant had in a matter concerning an appointment by the Government. I think that the view taken by the learned subordinate judge is perfectly sound and no question of qualified privilege arises in this case. In regard to the second point raised by Mr. Krishnaswami Ayyangar there was undoubtedly some force in his argument that the defendant while giving the apology never contemplated a civil action would again be brought against him. But the question is not what his client thought, but the question is what is the effect of the unconditional apology given before the criminal court? A certain act might give rise to a cause of action in tort and at the same time furnish a ground for a criminal complaint. Ordinarily in English law where a certain act gives rise to an indictment for felony and also to a civil action in tort, it is usual to have recourse to criminal proceedings before an action in tort for damages is filed. One remedy is different from the other and any adjustment of the criminal complaint would not operate as an accord and satisfaction of the civil action for damages. In the one case in the interests of the State the wrongdoer is punished, whereas in the other compensation is

awarded to the person who suffers by the injury. Therefore, unless at the time of giving the unconditional apology it was specifically agreed between the parties that the acceptance of the apology should also operate as an accord and satisfaction of the civil action, *prima facie*, I must take it that the parties intended to terminate the criminal litigation by the unconditional apology. I am inclined to agree with the lower court and hold that the endorsement in the criminal complaint made by the sessions judge terminates only the criminal complaint and cannot be construed as a release of the plaintiff's right of suit for damages. It appears that even after the termination of the criminal proceedings, this apology was published in the newspapers and the plaintiff may well have been content with that. But he has chosen to assert his legal right to get redress for the injury he has sustained and he cannot be deprived of his legal right, though discretion may be vested in the court in assessing damages. That is what the first court has done and I cannot say that the damages awarded is excessive, nor Mr. Krishnaswami Ayyangar complains that it is. I am also of the opinion that the order for costs is not wrong, because the defendant did not content himself with pleading that the unconditional apology given by him in the criminal case operated as an accord and satisfaction but began to justify his action by pleading qualified privilege and the court had to investigate into the matter. If he had not taken this other plea, I would probably have deprived the plaintiff of his cost of the litigation but in the circumstances I cannot say that the exercise of discretion by the lower court in awarding costs to the plaintiff is wrong.

The second appeal fails and is dismissed with costs. Leave to appeal refused.

N.T.R. — *Appeal dismissed*

C. R. C. No. 161 of 1941
Cr. R. P. No. 154 of 1941.
July 16, 1941
HORWILL, J

A. VENKATARAGHAVA IYER
v.
EMPEROR.

Local Boards Act (*Mad. Act XIV of* 1920), *Ss*. 193, 207 & *Sch. VII—Storing firewood —License not necessary.*

Sch. VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act, does not require that a license should be taken out for storing firewood. By not taking out a license, no offence is committed in storing firewood. Whether he could sell firewood without a license may depend on whether by doing so he was exercising a trade.

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the sub divisional magistrate of Saidapet dated 6—12—1940 and passed in C. A. No. 41 of 1940 preferred against the judgment of the court of the stationary sub magistrate, Uttermerur in C. C. No. 151 of 1940.

K. V. Ramachandra Iyeer, for Petr.
Public Prosecutor (*V. L. Ethiraj*), for Crown

ORDER.

The petitioner has been convicted—and the conviction has been upheld in appeal—under S. 193 of the Local Boards Act, read with S. 207 and Sch. VII, for failure to obtain a license for storing and selling firewood during the year 1939-40 within the limits of the Panchayat Board of Uttarmerur and he has been fined Rs. 5.

Sch. VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act; does not require that a license should be taken out for storing firewood. It was unnecessary therefore for the petitioner to have taken out a license; and by not taking out a license he commiited no offence in storing firewood. Whether he could sell firewood without a license may depend on whether by doing so he was exercising a trade. But this case did not turn on that. It was assumed that a license was necessary for storing firewood and both courts seem

to have been under a misapprehension on that point. The conviction is therefore set aside and the fine refunded.

N.T.R. *Conviction set aside.*

Cr. R. C. Nos. 750 & 751 of 1940
Cr. R. P. Nos. 707 & 708 of 1940

September 13, 1940

LAKSHMANA RAO, J.

SOUNDARARAJA AYYANGAR & another
v.
EMPEROR.

Criminal trial—Evidence of a witness Whether can be deleted from the record.

The evidence of a witness once taken cannot be deleted from the record and the accused are entitled to prove through him documents which are admissible in evidence.

THE FACTS relating to this case are set out in the following extracts of the affidavit filed along with the petition :

"2. The respondent-complainant was the consignee at Polur railway station of a tank waggon containing Diesel oil.

3. On the the morning of 21—6—40 the complainant's men started digging a pit, 3 feet in diameter and 4 feet in depth, at the edge of a sleeper in the siding at the station, to sink an open barrel in, into which the oil from the tank was to be drained, to facilitate refilling in fresh barrels.

4. I objected to this kind of digging a pit alongside the railway siding as it would lead to daugerous consequences such as subsidence of the track and consequent derailment. Such acts are forbidden and it is my duty to prevent them as a permanent way sub inspector in the employ of the railway company.

5. The complainant without my knowledge, acted in this objectionable manner on a previous occasion, and when I protested he abandoned it in a state dangerous to the safety of the track, and I had it filled up.

6. When I saw the complainant's men digging the pit on the morning of 21—6—1940, I warned them against such a procedure, and insisted on their using a hose-pipe for taking delivery of the oil from the tank. I then went away on duty.

7. When I returned in the evening I found, that contrary to my instructions in the morning, a pit had been dug in the process of discharging the oil.

8. Thereupon I told the complainant of the serious consequences the digging of the pit would lead to. But he lost his temper at my firm attitude, and started using indecent and abusive language against the railway staff in general and against me in particular.

9. When I took strong objection to the use of such language the complainant pushed me by the neck and pounced on me to assult me.

10. Immediately thereafter I made a complaint of it to the Railway Police and to my immediate official superior—the Railway District Engineer.

11. The complainant apprehending action against himself for this unauthorised action of his, and with a view to coercing me into silence, and dropping of such action as I have already taken, preferred a complaint against us charging us with offences under ss. 323 and 504 I.P.C.

12. At the trial before the stationary sub magistrate the prosecution examined as its 8th witness a head constable who was in charge of the Police station on the day of occurrence and who came into the witness box with the general diary containing the entry relevant to the occurrence in question as reported by the complainant. In the course of the cross examination of this witness, it was elicited that the complainant made mention of only one individual assaulting him and of whose name or designation he had not given any particulars. It was also elicited that he did not bring to the notice of the head constable any marks of assault on his person, about which he produced a medical certificate at the trial from a doctor at Thiruvannamalai. My counsel sought to mark the

portion relating to this incident in the general diary as an exhibit. The learned magistrate however refused permission to do so.

13. With the examination of P. W. 8 the prosecution closed their case and the learned magistrate framed a charge against us under ss. 323 and 504 I.P.C.

14. When P.W. 8 was recalled for further cross examination, my counsel filed an application before the magistrate for causing the production of the general diary and for permission to mark it as an exhibit through P. W. 8.

15. The complainant on the other hand having come to realise by that time that the evidence of P. W. 8 and the entries in the general diary would disprove his case opposed my application.

16. Then the learned sub magistrate suggested that if the complainant should file a petition for expunging the evidence of P. W. 8 from the record, he would pass orders thereon.

17. Thereupon the complainant filed a petition for expunging the deposition of P. W. 8 from the record.

18. The learned magistrate allowed the application of the complainant and ordered the expunging of the evidence of P. W. 8 from the record. My application for production and exhibiting the general diary was dismissed with an observation that I might summon P.W 8 as a defence witness."

Petition under ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the orders of the court of the 2nd Class Magistrate of Polur dated 26-8-1940 and made in C.C. No. 1400 of 1940 rejecting the application of the accused to cause the production of the general diary of the Polur police station through P. W. 8 so that it may be marked as an exhibit for the defence, and allowing the application of the complainant to expunge the evidence of P. W. 8 from the records.

P. C. Parthasarathy Ayyangar, for Petrs.
Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The evidence of P. W. 8 cannot be deleted from the record and the accused are entitled to prove through him documents which are admissible in evidence. The orders of the sub magistrate are therefore set aside and he is directed to proceed with the case in accordance with law.

T.

Cr. App. No. 870 of 1940

February 6, 1941.

LAKSHMANA RAO, J.

PUBLIC PROSECUTOR
v.
PAMANATHAM PILLAI

Evidence Act (1 *of* 1872)*—Accomplice—Accused causing arsenic to be mixed through a girl of* 13 *years—Girl, innocent agent—Girl, if an accomplice.*

The accused is stated to have caused arsenic to be mixed in the food of P. Ws. 4 *and* 5 *through P. W.* 3 *a girl aged about* 13 *years with intent to injure them and according to the prosecution P. W.* 3 *was an innocent agent. The assistant sessions judge convicted the accused on other evidence and on appeal the sessions judge acquitted the accused on the ground that P. W.* 3 *was an accomplice. On appeal,*

Held, *that the view of the sessions judge that P. W.* 3 *is an accomplice cannot be supported and the order was set aside and appeal remanded for disposal an the merits.*

FACTS: The accused is charged with an offence under S. 328 I. P. C. with having on the evening of 8—12—39, with intent to injure P. Ws. 4 and 5 caused them to take arsenic, a poison by getting it mixed by Poongavanam, P. W. 3 aged about 13 in the tamarind and water for the sauce of their night meal.

The assistant sessions judge found the accused guilty and in the course of his judgment observed: "That arsenic might have found its way accidentally into the sauce is, I think out of question. That it was P. W. 3 that had put powder which contained arsenic in the tamarind and water for the sauce is clear beyond doubt. It is extremely unlikely that P. W. 3

would have done this as child's play of her own accord. Her evidence that she did so at the direction of this accused appears to me to be fully believable. I do not think that in this case there could be any reasonable doubt about the part played by this accused in the mixing of poison in the sauce which was being prepared at the hut of P. W. 5 for his food. I am of opinion and find that this accused with intent to injure P. Ws. 4 and 5, sent P. W. 3, a young girl, with arsenic poison with directions to her to mix the poison in the ingredients for the sauce of P. Ws. 4 and 5, that P. W. 3 did accordingly mix poison and that therefore this accused is guilty under s. 328 I.P.C.

The assessors are of opinion that the accused is not guilty. But I am afraid that they have been swayed by an impression that it will be unsafe to convict a man on the bare testimony of a young girl like P. W. 3. In cases of poisoning it is not natural or at any rate easy to get more satisfactory evidence. The immaterial discrepencies in the evidence and the attempt of P. W. 3 to protect herself from being further pursued for what she had done are not in my opinion sufficient to show that her evidence about what she was asked to do by P. W. 3 and about what she did is unbelievable. I believe her evidence about the giving of the poison to her by the accused for mixing it in the sauce and about her having done so accordingly. I am therefore unable to agree with the opinion of the assessors."

On appeal the sessions judge set aside the conviction and said: "Though the learned Public Prosecutor contended that P. W. 3 was not an accomplice, there can be little doubt that she was. Apart from her silly story which cannot be believed for a moment that as the accused had placed on her head some sacred ashes before he tied the powder packet in her sari, she became entirely oblivious to what she was doing till she had finished the job with which she was entrusted, we have the further circumstance that this very girl refused to be a party to do anything of the kind when the accused asked her previously not once but several times. This refusal must be because she knew that she was being asked to do something highly improper, if not criminal. She is not able to explain why at first she declined to accede to the accused's request to put the powder into the food or the sauce and why she fled from him when the proposal was made. Further, we have that additional fact that she was conscious that she had done something guilty, as she tells us that she did not inform her mother or anyone else of what she had done. She attributes the omission to the accused having asked her not to mention the fact to her mother.

P. W. 3 being clearly an accomplice, we must have corroboration in material particulars of her story before the accused can be convicted. Such corroboration must chiefly relate not to the part or parts played by P. W. 3 in the transaction but by the accused. For instance, it had not been shown that the accused had purchased arsenic previously or was in possession of the packet sometime before the occurence and so on and so forth. The learned Public Prosecutor conceded that there was no such corroboration.

Apart altogether, therefore from the question whether there are inconsistencies between the present prosecution story and what P. W. 4 the poisoned woman told the police sub-inspector in her first statement Ex. F, the conviction has to be set aside as it rests solely on the testimony of an accomplice without any corroboration.".

Against this the Provincial Government preferred an appeal on the ground that the learned judge erred in holding that the evidence of P. W. 3 should not be acted upon without corroboration and the learned judge's reasons for holding that P. W. 3 is an accomplice are erroneous.

Appeal under s. 417, Cr.P.C., 1898, against the acquittal of the aforesaid respondent (accused) by the sessions judge of Salem in C. A. No. 68 of 1940 on his file (S. C. No. 44 of 1940 on the file of the court of the assistant sessions judge of Salem).

Public Prosecutor (V. L. Ethiraj) for Crown

K. S. Jayarama Iyer & G. Gopalaswami, for Accused.

JUDGMENT

This is an appeal by the Provincial Government against the acquittal of the respondent of an offence under s. 328 I. P. C.

The respondent is stated to have caused arsenic to be mixed in the food of P. Ws. 4 and 5 through P. W. 3 girl aged 13 years with intent to injure them and according to the prosecution P. W. 3 was an innocent agent. The assistant sessions judge convicted the respondent on her evidence and on appeal he was acquitted by the sessions judge on the ground that P. W. 3 was an accomplice. Hence this appeal and the view of the sessions judge that P. W. 3 was an accomplice cannot be supported. The order of acquittal is therefore set aside and the appeal is remanded to the sessions judge for disposal on the merits.

T. *Case remanded.*

Cr. R. C. No. 323 of 1940
Cr. R. P. No. 312 of 1940

September 27, 1940

LAKSHMANA RAO, J.

MUTHUSAMI TEVAR *alias* Mappillaisami Tevar
v.
RAJAH RAM PANDIAN of Ramnad

Cr. P. C. (V of 1898*), s.* 146 (1)—*Attachment of undivided share.*

The attachment of an undivided share of a village is not permissible under s. 146 (1), *Cr. P. C.*

THE FACTS were as follows: "On the application of the petitioner proceedings under s. 145 were started. Respondent claimed to be in possession of the entire village but the joint magistrate found that 5/8ths of the village belonged to the respondent and that the petitioner was entitled only to 3/8ths. In a revision filed against that order, being Cr.R.C. No. 56 of 1940, the High Court held that the declaration that the respondent was entitled to possession of an undivided 5/8ths must be set aside, as it was not permissible under S. 145, Cr. P. C. Subsequently the joint magistrate passed the order against which the present revision is filed, which was as follows:

"This court has already found that valid possession and enjoyment of 5/8 of the village is with the minor. As regards 3/8 of the village the court was unable to determine who was in possession. As there is a liklihood of a breach of the peace about this 3/8, I now proceed to attach the 3/8 portion of the village of Vathiendal under s. 146 (1) Cr.P.C. and appoint as receiver the Revenue Inspector of Madukulathur. The latter will arrange to collect the melvaram etc., on 3/8 share of this village from the ryots with the help of the headman of Simtalai, and to deposit the amounts in Court."

Petition under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the joint magistrate of Ramnad dated 8—1—1940 and passed in M.C. No. 22 of 1939.

K. S. Jayarama Iyer & G. Gopalaswami, for Petrs.

N. Somasundaram, for Respt.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The attachment of an undivided share of a village is not permissible under s. 146(1), Cr.P.C. and the order of the joint magistrate is set aside.

N.T.R.

Cr. R. C. No. 733 of 1940
Cr. R. P. No. 692 of 1940

January 10, 1941.

LAKSHMANA RAO, J.

AHMED MOHIDEEN
v.
YUSUF ALI SYED

Cr. P. C. (V of 1898), S. 197—Sanction necessary before complaint can be filed against Assistant Commissioner on ground that he asked the sub inspectors to beat the complainant to wreak his private vengeance.

A complaint was filed against the first accused, the assistant commissioner of police and 2 and 3 accused, sub inspectors under him under Ss. 323 and 352 I. P. C. read with Ss. 109 and 114, that the first accused instigated accused 2 and 3 to cause injuries to the complainant and belaboured him to wreak his vengeance. Summonses were issued to all three. The first accused applied to quash the proceedings on the ground that the offence, if any, was committed while in discharge of his official duties and he being a member of the Indian Police Service sanction under S. 197, Cr. P. C. ought to have been obtained before launching the above proceedings and hence the proceedings were ab initio void and ultra vires. It was proved that the first accused arresting and taking the complainant was not an isolated act but in consequence of what transpired the previous day when the police raided his premises which was used as a common gaming house for the purpose of accepting bets on horse races, that in pursuance of the raid the police seized betting slips and incriminating documents and as the complainant escaped and he was wanted he was arrested the next day and the case was under investigation. The lower court upheld the objection on the ground that at the time the first accused was discharging his duties pertaining to his office and if he incidentally did any act outside the scope of his functions as such officer, nevertheless sanction would be necessary.

Held, *in revision, that the respondent gave the order to beat the complainant while acting or purporting to act in the discharge of his official duty and he not being removable from his office save by or with the sanction of the Secretary of State, under S. 197, Cr. P. C. no court could take cognisance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment.*

THE FACTS appear from the judgment of the lower court which was as follows:

"This is an application by the prosecuting inspector of police on behalf of Yusuf Ali Syed, Assistant Commissioner, Southern Range, Madras city, to quash the proceedings initiated against him for an offence under Ss. 323 and 352, I. P. C. read with Ss. 109 and 114, I. P. C. on a complaint preferred by one Ahmed Mohideen Khan on the ground that the offence, if any, was committed while in discharge of his official duties and he being a member of the Indian Police service, sanction under S. 197, Cr. P. C. ought to have been obtained before launching the above proceedings and since no such sanction was obtained all proceedings are *ab initio* void and *ultra vires.* It is further argued that material particulars in the complaint have been suppressed and that the complainant was as a matter of fact arrested on the 10th in pursuance of something that took place on the 9th in which he happens to be an accused.

On 31—7—1940 Rao Bahadur V. T. Rangaswâmi Ayyangar presented a complaint before me on behalf of Ahmed Mohideen that under the instigation of Yousuf Ali Syed the first accused, the second and third accused who are sub inspectors under him caused injuries to his client. The gist of the complaint is as follows: On account of long standing enmity between the first accused and the complainant, at about 11 a. m. on the 10th of July 1940 while the complainant was at Thousand Lights, the first accused came in a car with some policemen and

took the complainant. After going some distance the complainant was asked to get down from the car and walk the rest of the distance to the police station in company with some policemen. On reaching the Ice House police station the first accused ordered the second and third accused who are sub inspectors to take the complainant to the record room adjacent to the lock-up. While being conducted the first accused who was following addressed the complainant as follows: "You have abused me all these days. What do you say now. The complainant denied having abused him. The first accused called him a liar and ordered the second and third accused to beat him. Immediately these two gave him a number of blows on several parts of his body with a stick and fisted him. He sustained injuries one of which was a bleeding injury above the left eye brow. He was under medical treatment for a fortnight and bed-ridden for a week.

Now as this complaint did not disclose that the assistant commissioner instigated his sub inspectors to cause injuries to the complainant whilst in the discharge of his official duties and clearly showed on the other hand that on account of prior enmity he had taken the complainant to the police station and had him belaboured there to wreak his vengeance, I was of opinion that the accused was not acting in discharge of his official duties and consequently no sanction under S. 197, Cr. P. C. was required. Summonses were issued returnable 7—8—1940. On that date the prosecuting inspector appeared before me and raised the preliminary objection that sanction not having been obtained as required under S. 197, Cr. P. C. the proceedings initiated against the first accused are *ab initio* void, that his client must be discharged or that the proceedings in so far as they relate to him should be quashed. As counsel for the complainant wanted time to argue the question of law, the case was adjourned to 12th August. On that date both sides argued at great length. It is unnecessary for me to set out the various decisions quoted and the arguments advanced. The prosecuting inspector urges that from the petitions submitted to the Commissioner of Police, the Inspector General of Police and the Local Government by the complainant, it is amply clear that the alleged incident of the first accused arresting and taking the complainant from a house in Thousand Lights is not an isolated act but in consequence of what transpired the previous day when the police raided his premises which was used as a common gaming house for the purpose of accepting bets on horse races. The prosecuting inspector further says that in pursuance of the raid the police seized betting slips and other incriminating documents and as the accused who escaped was wanted, he was arrested on the 10th. The above case is now under investigation. While so, with a view to stifle the prosecution the complainant by suppressing all material facts and by setting forth only facts that would lend colour to the charge that the Assistant Commissioner wreaked his vengeance in his private capacity has invoked the powers of this court and got the summons issued against him. He has quoted two decisions in support of his contention: (1) 1939 M. W. N. 741 : Cr. 105 and (2) (1935) 36 Cr. L. J. 650.

These decisions seem to me to conclusively lay down that the nature of the act need not appertain to the functions or duties of the particular officer concerned; what is required is that at the time he should be discharging the duties pertaining to his office and if incidentally he does any act outside the scope of his functions as such officer nevertheless sanction would be necessary.

In view of these decisions I must uphold the preliminary objections and cancel the summons issued against him.

As regards A–2 and A–3 it is conceded that no sanction is necessary. I consider that it is better that they should be tried by some other magistrate and I direct that they be tried by the second presidency magistrate, George Town."

Petition under ss. 435 & 439 Cr.P.C. 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras, dated 19—8—1940 and passed in C. C. No. 2686 of 1940.

V. T. Rangaswamy Iyengar & K. Ramaswamy Iyengar, for Petr.

V. L. Ethiraj & A. S. Sivakaminathan, for Respt.

Crown Prosecutor (P. Govinda Menon), for Crown.

ORDER

The house of the complainant was raided by the respondent, the Assistant Commissioner of Police, under the provisions of s. 42 of the Madras City Police Act on 9th July last and instruments of gaming on horse races were found. The complainant escaped and he was arrested by the respondent on 10th July and taken to the police station. Two sub-inspectors are stated to have beaten him in the station under the orders of the respondent and as urged by the Crown Prosecutor the respondent gave the order while acting or purporting to act in the discharge of his official duty. He is not removable from his office save by or with the sanction of the Secretary of State and s. 197, Cr. P. C. enacts that no Court can take cognizance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment. The revision petition therefore fails and is dismissed.

T. — *Petition dismissed*

Cr. R. C. No. 493 of 1941
Cr. R. P. No. 464 of 1941

August 6, 1941

HORWILL, J.

PERIANNA MUDALI & Others
v.
EMPEROR

Cr. P. C. (V of 1898), s. 530 (p)—Trial by magistrate for the less serious offence—Effect of.

Where a court tries a person for an offence less serious than was actually committed, whether or not the High Court should interfere would depend upon whether the magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If the magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him and he had in fact jurisdiction to try the lesser offence, his proceedings would be proper and the High Court would not interfere.

Petition under ss. 435 & 439, Cr.P.C., 1898 praying the High Court to revise the order of the Court of the 2nd Class Magistrate of Vellore dated 10—3—1941 and made in C.C. No. 54 of 1941,

V. T. Rangaswami Ayyangar, for Petr.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The prosecution case was that the Deputy Tahsildar saw a number of goats grazing in the forest and that finding that the owner had no license for so grazing them, he proceeded to drive them to the cattle pound. On the way, the Deputy Tahsildar was met by the 1st and 2nd accused, who are brothers and owners of the goats and by the 3rd accused their friend. Without disclosing the fact that the 1st and 2nd accused were the owners of the goats they told the Deputy Tahsildar that they would assist him in driving the goats to the pound; and they led him not to the pound but to their own pen. The Deputy Tahsildar duly drove the goats into the pen and upon entering the village to inform the village magistrate, he was told that the enclosure into which he had driven the goats was not a cattle pound but a private pen of the owners of the goats. The Deputy Tahsildar thereupon filed a complaint in the court of the local sub magistrate, and in due course a charge was framed against all the three accused under ss. 417 and 379, I. P. C. The case has not yet ended; but this revision petition was admitted because it was contended on behalf of the accused that the offence actually committed was one under s. 420. I. P. C., an offence punishable only by a First Class Magistrate.

The leading case on the question as to the effect of trying persons for an offence less serious than was actually committed is

to be found in *King Emperor* v. *Ayyan* [1], a decision of a Bench of this Court. The argument of the learned advocate for the petitioners is that the act of the Magistrate, whether the framing of the charge for a lesser offence was deliberate or not, makes his proceedings void; because s. 530 (p) of the Cr. P. C. says that if any Magistrate, not being empowered by law in this behalf, tries an offender, the proceedings shall be void. What that really means is pointed out in the case above referred to in these words:

"The meaning of this is that if a magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. In the present case the deputy magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under s. 193, I. P. C., i. e., for on offence triable by a first class magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the magistrate, it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in doing so he adopts a proper course is another question. No doubt it is improper on the part of a magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction............ It would also, in our opinion, be open to the revising and appellate authorities to set aside the magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void *ab initio*, but because they were improper and the interests of justice required them to be set aside."

A similar question came up before Jackson, J. in *Kattuva Rowther* v. *Suppan Asari* [2]. The learned Judge draws from *King Emperor* v. *Ayyan* [1] the following proposition: if a magistrate entirely overlooks some fact which would carry the case beyond his jurisdiction and tries the accused for a lesser offence, he is not held to have acted without jurisdiction. The question whether he has or has not entirely overlooked the circumstances would be one of fact. If, on the other hand, he does not overlook the circumstance, but after his attention has been drawn to it he deliberately ignores it, his proceedings would be improper, though not void. Venkatasubba Rao J. in *Setti Rangayya* v. *Somappa* [3] does not refer to *King Emperor* v. *Ayyan* [1], but his attention was drawn to 2 Weir's Criminal Rulings No. 517 dated 26th October 1885, which was a case where the Magistrate had charged an accused under s. 417 I. P. C. although the offence committed was one punishable under s. 420 I. P. C. In this case it was laid down that as the accused had committed an offence under s. 417 as well as under s. 420, he could be legally convicted of both and therefore the conviction for the minor offence was not absolutely illegal. But the learned Judges added:

"But the doctrine that no tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognisable only by a higher tribunal still holds good, and where the accused has himself objected to the jurisdiction, it is possible that the High Court would feel itself bound to interfere."

Venkatasubba Rao J. who was dealing with a very similar question, followed that authority. It will therefore appear from the above decisions that whether or not the High Court should interfere would depend upon whether the Magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If the Sub Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him, and he had in fact jurisdiction to try the lesser offence, his proceedings would be proper and the High Court would not interfere.

On the facts of the present case, I am inclined to think that the accused would not have been guilty of an offence punishable under s. 420 I. P. C. for even after the Tahsildar had driven the goats into the pen of the accused, he still retained control over them; and he would lose that control only if the accused did some act which

1. [1901] 24 Mad. 675
2. [1927] 25 L.W. 86
3. [1925] 20 L.W. 919

would have prevented the Tahsildar from removing them again if he had so wished. Whether that view is correct or not, I do not think that there is any ground here for believing that the Sub Magistrate clutched at jurisdiction. The learned Advocate for the petitioners points out that the fact that the accused were also charged with theft indicates that both the prosecution and the Sub Magistrate seemed to have realised that there was a constituent in the offence which was rather more than was required for a charge under s. 417 —a constituent which showed that the Tahsildar had parted with possession in favour of the accused because of the deceit that had been practised on him. On the facts as narrated to me by the learned Advocate for the petitioners, it is difficult to see how there was an offence of theft. There might have been, if the accused afterwards took the goats away to some other place without the Tahsildar's permission—or perhaps if they had prevented the Tahsildar from having access to the goats. The evidence however is not before me; and so I do not wish to express any opinion as to whether the offence of theft was committed or not. If there was, it was probably not a part of the same transaction which led to the offence of cheating. On the facts before me, I am not prepared to say that the Magistrate is wrong or that any interference is called for from this court.

The petition is accordingly dismissed.

N.T.R. *Petition dismissed*

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Cr. R. C. No. 384 of 1940
Cr. R. P. No. 373 of 1940

August 9, 1940

LAKSHMANA RAO, J.

MANICKAVASAGA NADAR
v.
K. KRISHNASWAMI IYER

Cr. P. C. (*V of* 1898), *ss.* 133, 139 *&* 140—*Proper application.*

Where an order under s. 133 *Cr. P. C. was not made absolute under Cl.* (1) *of s.* 139 *Cr. P. C, further proceedings must be dropped under Cl.* (2) *and to such a case S.* 140 *Cr. P. C. is inapplicable.*

FACTS. The Nadars of the village of Chintamani contended that they were entitled to take their Mariamman deity in procesion among others through the Brahmin street of Chintamani, a public highway. The Brahmins of Chintamani resisted this claim and filed O. S. No. 605 of 1930 (subordinate judge's court Tinnevelly) for a permanent injunction to restrain the Nadars from taking their deity in procession through the Brahmin street, otherwise called the Agraharam street. The suit was dismissed by the sub court for non-prosecution.

On 14th November 1939, the Nadars took the Mariamman deity in procession and when it entered the Brahmin street, the Brahmins objected to the procession being taken along the street. The police stopped the procession dispersed the crowd and the deity and the chapram were left at the spot where they stood. On 15th November the police applied for and obtained an order under S. 133 Cr. P, C. and this was made absolute *ex parte* on 17th November 1939.

When the petitioner become aware of the *ex parte* order he moved the sub divisional magistrate and requested him to reopen the matter, by appointing a jury under S. 135, (b), Cr. P. C. and the magistrate granted the prayer under S. 138 Cr. P. C.

The jury decided having regard to all the circumstances of the case that the temple car and the deity should not be taken back in reverse but should be allowed to go in procession through the Brahmin street and other car streets. The magistrate while agreeing with the jury with regard to the route, directed that there should be no procession and modified the jury's verdict by saying that the temple car and the deity will be allowed to be taken along the South Car Street otherwise known as Brahmin or Agraharam street, without the paraphernalia of a

regular procession but with the required number of persons to drag the car.

Against this order dated 3rd January 1940, the Brahmins went up in revision to the High Court. (Cr. R. C. No. 22 of 1940). Lakshmana Rao, J. held on 25—1—40 that under the provisions of the Code, when the sub divisional magistrate did not accept the jury's verdict he should have dropped the proceedings under Chap. X as required by S. 139, Cr. P. C. and in that view set aside the order of the lower court saying "the local authorities may take appropriate steps for removal of the obstruction.'

Subsequent to the said order, the lower court passed an order on 7th April 1940 to the following effect:

"Whereas an order dated the 17th day of November 1939 was issued under my hand requiring you to obey the order dated 15th November 1939 requiring you to remove the deity and chapram from the public street as it is causing obstruction and annoyance to the public.

The order aforesaid was made absolute and I hereby direct and require you to obey the said order within one week from the date of receipt of this order on peril of the penalty by S. 188 of the I. P. C. for disobedience thereto."

The final order was passed on 27-4-1940 to the following effect:

"In this court's order Misc. 28 of 40 dated 7th April 1940 the counter petitioner, Manickavasaga Nadar was directed to remove the chapram of Mariamman now left in the Brahmin street of Chintamani under Ss.167 and 140 Cr. P, C. In his petition dated 17th April 1940 Manickavasaga Nadar represented the practical difficulties he had to contend with in having the chapram removed. The Brahmins objected to the dragging of the chapram forward through South Car Street. It was inauspicious to allow the chapram to retrace its way backward. He wanted a route to be shown to him to remove the chapram. In his petition dated 20th April 1940 he requested permission to drag the chapram forward through the Brahmin street with adequate police bandobust. I realise that there is a general feeling among the Hindus that the chapram should not be made to retrace its way. At the same time I find that I cannot in the face of the High Court's orders on the subject allow it to be dragged forward through the Brahmin Street. I have inspected the locality today. I find that the most feasible way of removal is to take the chaparam through the land which branches off from the head of the Brahmin street, northwards a little in front of the place where it now stands and then again through the South Mada Street of the Iswaran Koil turning again to the north and cutting through the Pillaimar street until it reaches the Nayakar street. The counter petitioner is directed to take this route in removing the chapram after giving timely notice of his intention to the Deputy Superintendent of Police at Kuttalam. The chapram should be removed before 7th May 1940. Failure to comply with the order will make him liable to the penalty provided under s. 188 I. P. C."

The said order was served on the petitioner on 29th April 1940. Against this order the present revision was filed on grounds *inter alia*:

"1. The proceedings before the lower court having been dropped under s. 139 cl. 2, Cr. P. C. it was no longer competent to the lower court to proceed under Chap. X, Cr. P. C.

2. The lower court ignored that no order under ss. 137 and 140 Cr. P. C. could at all be passed in the circumstances of the case.

3. The lower court erred in law in thinking that there was any order still in force that could be enforced and it appears to have wholly misconstrued the order of this Hon'ble court in the criminal revision case above referred to.

4. In all the circumstances of the case the entire proceedings before the lower court are devoid of jurisdiction and is misconstrued and is liable to be quashed and the order dated 27th April 1940 is also further liable to be set aside."

Petition under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the sub divisional first class magistrate of Koilpatti dated 27-4-1940 and passed in M.C. No. 28 of 1940.

V. Rajagopalachari & D. Israel, for Petr.
G. Gopalaswami for Respt.
Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER.

The order under s. 133, Cr. P. C. was not made absolute under Cl. (1) of s. 139, Cr. P. C. and further proceedings had to be dropped as provided in Cl. (2) of S. 139, Cr. P. C. S. 140, Cr. P. C. is therefore inapplicable and the order of the sub divisional-magistrate cannot be sustained. The revil sion petition is therefore allowed and the order of the sub divisional magistrate is set aside.

N. T. R. *Petition allowed.*

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Cr. App. No. 269 of 1941
August 4, 1941
HORWILL J.
SUBRAMANYA GOUNDAN & another
v.
EMPEROR

Penal Code (XLV *of* 1860), *ss.* 302, 323 & 34—*No evidence of appellants' common intention that the person that killed the deceased had a weapon hidden—Offence committed.*

The two appellants and one T threw stones at the deceased. A stone thrown by T *struck the deceased on the neck and knocked him down.* T *thereupon attacked the deceased with a knife while the appellants pursued P. W. 4, who was with the deceased.* T. *called back the appellants, saying that there was no necessity to pursue P. W. 4. The appellants returned, but* T *continued to give one or two more stabs to the deceased. The question was whether the part that the appellants played made them liable for punishment under s.* 302 *read with s.* 34 *I. P. C. The Sessions Judge held they were so liable, observing that the fact that accused* 1 *and* 2 *and* T *came together armed with stones, the fact that they were throwing stones at the deceased, and abusing him in foul language at the time of occurrence the fact that they came from the neighbouring land of the 2nd accused, and the fact that* T *had then a dagger secreted in his waist, showed that accused I and* 2 *and* T *had a common intention to do away with the deceased. In appeal,*

Held, *that the appellants and T came with the common intention of throwing stones and causing injury to the deceased was beyond question; but the evidence did not justify the conclusion that the two appellants knew that* T *was carrying a knife or that they in any way facilitated the attack of* T *on the deceased and hence the appellants should be given the benefit of the doubt with regard to their knowledge of what* T *was about to do and to the common intention with which they and* T *came to the scene of offence and that the appellants could only be convicted under s.* 323, *I. P. C.*

Appeal against the order of the Additional Sessions Judge of the Court of Session of the Coimbatore Division in C.C.No. 4 of 1941.

Accused not represented.
Public Prosecutor (V.L. Ethiraj) for Crown.

JUDGMENT.

The appellants were convicted by the Additional Session Judge of Coimbatore of the offence punishable under s. 302 I. P. C. and sentenced to transportation for life.

P. W. 4 was with the deceased man when he met his death. He deposed that the appellants and one Tirumalai Goundan, who was absconding, rushed on the deceased, who was an old man, and threw stones at him. A stone thrown by Tirumalai Goundan struck the deceased on the neck and knocked him down. Tirumalai Goundan thereupon immediately attacked the deceased with a knife, while the appellants pursued P. W. 4. Tirumalai Goundan called back the appellants stating as they had caught the deceased, there was no necessity to pursue P. W. 4. The appellants returned, but Tirumalai Goundan continued to give one or two more

stabs to the deceased. The deceased received three stabs, all of which were inflicted by Tirumalai Goundan. The evidence of P. W. 4 is corroborated by P. W. 5 and P. W. 6, who arrived at the scene upon hearing a disturbance and were told by the deceased that he had been attacked by the appellants with stones and that Tirumalai Goundan had stabbed him. The deceased gave a similar statement in the dying declaration (Ex. B) taken by the Magistrate the following morning.

The appellants very foolishly denied having been present when the deceased met his death, but there can be no doubt that they were. The only question is whether the part that they played makes them liable for punishment under s. 302 I. P. C. by virtue of s. 34 I. P. C. The learned Sessions Judge held that they were so liable. He says "being hit by a stone thrown by Tirumalai Goundan, the deceased fell down. Then Thirumalai Goundan got an opportunity and stabbed the deceased. Accused 1 and 2 were then present. They were then throwing stones at the deceased as also indiscriminately to prevent other persons coming to the scene." If the latter part of the sentence were true, then I think the learned Session Judge was warranted in finding the two appellants guilty under s. 302 I. P. C. but this finding was based on a solitary statement of P. W. 4 in chief examination that they were throwing stones indiscriminately to keep people off. His evidence on this point cannot be accepted, because it is clear from the evidence of P. Ws. 4 to 6 that no persons came to the scene of offence before the assailants left. P. Ws. 5 and 6 were first at the scene of occurrence, and they arrived just in time to see the appellants and Tirumalai Goundan running away. In cross-examination, P. W. 4 himself admits that no one came to interfere at the time of stabbing. The learned Sessions Judge further says "the fact that accused 1 and 2 and Thirumalai Goundan came together armed with stones, the fact that they were throwing stones at the deceased, and abusing him in foul language at the time of occurrence, the fact that they came from the neighbouring land of the 2nd accused, and the fact that Thirumalai Goundan had then a dagger secreted in his waist—these facts taken together show that accused 1 and 2 and Thirumalai Goundan had a common intention to do away with the deceased". That the appellants and Thirumalai Goundan came with the common intention of throwing stones and causing injury to the deceased, is beyond question; but I do not think that the evidence justifies a conclusion that the two appellants knew that Thirumalai Goundan was carrying a knife, or that they in any way facilitated the attack of Tirumalai Goundan on the deceased, or that they attempted to prevent any person from coming to the assistance of the deceased. The most serious point against the two appellants is that they did nothing to prevent Tirumalai Goundan from inflicting the fatal stabs; but the evidence was not directed to this point and it is not clear that after they had pursued P. W. 4 and returned, Tirumalai Goundan inflicted any further stabs.

I think therefore that the appellants should be given the benefit of the doubt with regard to their knowledge of what Tirumalai Goundan was about to do and to the common intention with which they and Tirumalai Goundan came to the scene of offence from the 2nd appellant's field. I therefore allow the appeal and set aside the conviction under s. 302 I. P. C. and the sentence of transportation for life and convict the appellants under s. 323 I P. C. sentencing them to one year's rigorous imprisonment.

T. *Appeal allowed*

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Cr. R. C. No. 806 of 1940
Cr. R. P. No. 760 of 1940
August 1, 1941
HORWILL, J

THE INSPECTING ASSISTANT COMMISSIONER OF INCOME TAX
v
CHOTABHAI JAVERBHAI & others.

Incometax Act (XI of 1922), Ss. 22 (2) & 52—'Person'—Includes agent—False return by agent—Prosecution of.

The word 'person' in s. 22 (2) and s. 52, Incometax Act includes a person duly authorised. A power of attorney agent can present an income tax return on behalf of an assessee; and he, the agent can be prosecuted for submitting a false return.

The inference that a power of attorney agent had the authority to present income tax returns and that the principals ratified his action can be drawn from the wide and general terms of the power as also from the practice in previous years.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the Court of Presidency Magistrates, Egmore dated 2—9—40 and made in C. C. No. 2186 of 1940.

V. L. Ethiraj & A. S. Sivakaminathan, for Petr.

K. S. Jayarama Iyer, V. V. Srinivasa Iyengar, P. S. Sarangapani, T. R. Venkatarama Sastri N. D. Varadachari & R. Viswanathan, for Respts.

Crown Prosecutor (P. Govinda Menon), for Crown.

ORDER

The five accused in the lower Court are partners of a firm of the name of Chotabhai Javerbhai doing business in yarn and silver; and the 6th accused is the son of the 1st accused and the power-of-attorney agent of the firm in Madras. The 6th accused submitted an income-tax return showing profits of about Rs. 5,000. P. W. 4, the then Income-tax Officer, upon looking through the accounts of the accused firm, discovered that the figure '1' had been introduced in front of the figures 3180 on the debit side, thus indicating an expenditure of Rs. 10,000 more than if that '1' had not been inserted. This aroused P. W. 4's suspicions, and so he examined the accounts more closely. He then discovered that many fraudulent entries had been made in the accounts and that the profits were at least Rs. 41672. After a full examination of the accounts he assessed the firm's profits at more than Rs. 65,000; but as an appeal is pending with regard to Rs. 24,000, the case proceeded on the footing that the profits of the firm for the year in question were Rs. 41,672. It was the 6th accused who had made calculations and submitted the return; but a complaint was filed by the Inspecting Assistant Commissioner against all the accused alleging that they had fraudulently introduced these false entries into their accounts with a view to defraud the Income-tax authorities and had thereby made themselves liable for punishment under s. 52 of the Income-tax Act and under ss. 193 and 196 of the Indian Penal Code. The learned Chief Presidency Magistrate by whom this case was tried, came to the conclusion that neither in law nor in fact was the 6th accused authorised to file an income-tax return and that therefore no prosecution could be launched with regard to a return which had no legal significance. In considering the charges under ss. 193 and 196 of the Penal Code, he came to the conclusion that although it was true that the false entries had been made in these accounts, there was nothing to show that the 6th accused—and still less the other five accused—had any knowledge of these false entries and that the necessary *mens rea* for a criminal conviction was lacking. He therefore discharged all the accused. A revision petition has been filed by the Crown against this order of discharge.

It is not here disputed that the 6th accused was the agent of accused 1 to 5 in the conduct of the Madras business. A general power-of-attorney by the five partners in his favour has been marked as Ex. U. It is however argued by all the six accused that the 6th accused had no authority to file an income-tax return. The power-of-attorney is worded in the very widest terms, although no specific refer-

ence is made to the filing of income-tax returns. The 6th accused is empowered under Cl. 5 "to sign and verify plaints—and all other documents and papers and to institute or defend any proceeding in any court of law etc." In clause 11 he is authorised to appear and represent the firm "before any Revenue Officer, Railways, Port Trust, Corporations, and all departments of the Government or Local authority". Under clause 14 he is authorised "generally to do all acts and things necessary or expedient in the interests of the said firm as fully and effectually as we could have done if personally present", and the partners "agree to ratify and confirm all that our said attorney or attorneys shall do or cause to be done in the execution of these presents". The 6th accused for many years acted as the agent of the firm and in pursuance of this power of attorney dated the 7th February 1935, he did, in fact, send in income tax returns. The other partners of the firm knew that he was sending in income-tax returns and they of course knew in due course what profits he had shown in his accounts and in his return to the Income-tax officer; and they seem to have always approved of his conduct and his representations before the Income tax authorities. In the year in question, when he presented his return P. W. 4 asked him why he had submitted his report and not the partners themselves: and the 6th accused's reply was that he was the accredited agent of the firm in Madras. In support of his statement he showed the Income-tax Officer Ex. U. P. W. 4 acted upon this representation as he or his predecessors had done in previous years. There can therefore be no doubt—whether the very wide and general terms of Ex. U extracted above expressly authorised the 6th accused or not—that the 6th accused regarded himself as the agent of the firm for the purposes of filing Income-tax returns and that accused 1—5 intended him to file them and expressly or impliedly authorised him to file the return in question.

A more serious argument against the validity of the prosecution is that in law he was not the agent of the firm, in that the Income tax Act does not permit of an agent's presenting an income-tax return. It is pointed out that s. 22 (2), for example, requires the Income-tax Officer to serve a notice upon any person whose total income in his opinion is such an amount as is liable to render such person liable to income tax. That person is then required to make a report. The subsequent sections continue to refer to that person. That person may be a firm, it is argued, but it must be some individual or body of individuals, himself or themselves liable to assessment. I have not however been given any cogent reason why, if an assessee can present a return, his agent cannot do it for him. The principle "*qui facit per alium facit per se*" is of very wide and general application. An exception would arise if a person entered into a contract to have something done by one on whose personal skill he relied. There seems however to be nothing in the Incometax Act which suggests that it is essential that this act of sending in an incometax return should be done only by an assessee. It can be done not only equally well by the person in charge of the business, but very much better. Paragraph 90 of the instructions issued by the Central Board of Revenue says:

> "Returns and verifications required under the Act must be signed either by the assessee himself or by some representative duly authorised for the purpose in proper legal form, so that his acts will bind his principal."

S. 52, which is one of the provisions of law under which the accused have been charged, says:

> "If a *person* makes a statement in a verification mentioned in s. 19-A or s. 20-A or s. 22—which is false and which he either knows or believes to be false—(he) shall be deemed to have committed the offence described in s. 177 I. P. C.

Mr. Venkatarama Sastri contends that the word 'person' referred to here means the assessee, as it does in s. 22 (2) and elsewhere, and that one should not give to the word 'person' in this section its ordinary meaning. I do not see why the word

'person' should not have its dictionary meaning in s. 52; but even if it means only what the same word means in s. 22 (2), I am satisfied for the reasons given above that the word 'person' includes a person duly authorised. Far from agreeing, therefore, with the learned magistrate that 'the 6th accused had no authority in law or in fact to make the return which he did'. I hold that the 6th accused had authority both in law and in fact to make the return he did.

The learned magistrate has discussed but little the actual evidence against the accused which would go to support a charge under s. 52; because he had arrived at the conclusion that whatever may have been the guilty knowledge and intention of the 6th accused he could not be liable under s. 52 of the Act. It has been argued by Mr. Venkatarama Sastri for the 6th accused that the evidence on record is insufficient to justify this court in ordering any further proceedings. I wish to say as little about the matter as possible, because it is desirable that the magistrate and not this court should adjudicate upon the weight of the evidence and give a finding whether or not the evidence is sufficient to bring home the charge to the accused. I need only say that it is difficult in the absence of some sort of explanation by the 6th accused to understand how on one day a clerk or subordinate could put Rs. 10,000 in his pocket without the manager of the business being any the wiser, on another day not long afterwards putting Rs. 8400 in his packet and the day after that again another Rs. 1,600. It is also difficult to understand how an intelligent man of business should not be aware that his business was making a substantial profit (Rs. 40,000 and more a year) and believe that his firm was doing so badly as to make only Rs. 5,000 a year. I do not wish to express any opinion whether this, in itself would be sufficient evidence to justify a conviction. Still less do I wish to say that this is so conclusive against the accused that nothing he can say would rebut that evidence. But I think that these facts and the other evidence in the case require further consideration by the magistrate.

With regard to the charge against the accused under ss. 193 and 196, I. P. C., Mr. Venkatarama Sastri has put up a very strong argument which if correct, would show that the complaint had not been made by the proper person within the meaning of s. 175, Cr. P. C. This objection to the complaint was not raised in magistrate's court, and the learned Public Prosecutor points out that because that was not done he is not in a position on the evidence on record to satisfy me that the complaint was made by a proper person. He however contends that if it is questioned in the trial court, he is prepared to adduce evidence to satisfy the court that the complaint made was a proper one upon which a court can proceed. As the case is going back to the magistrate, the question of the propriety of the complaint with regard to the charges under ss. 193 and 196, I. P. C. will be left open for the consideration of the magistrate.

Although the accused 1 to 5 knew that the sixth accused was showing that the firm had made a profit of nearly Rs. 5,000 and must have been somewhat surprised it was not doing better, yet in a criminal case where the burden of proving knowledge and intention is upon the prosecution, I do not think it can be said that the accused 1 to 5 knew beyond all reasonable doubt that the 6th accused was making fraudulent returns. So that I do not think it is in the interests of justice that I should require the Presidency Magistrate to make any further inquiry into the charges against them.

In the result, the order of discharge by the Presidency Magistrate with regard to the 6th accused only is set aside and some magistrate other than the Magistrate against whose judgment this petition has been preferred is ordered to make further inquiry into the case against him.

The petition against accused 1 to 5 is dismissed.

N.T.R.

Cr. R. C. No. 633 of 1940
Cr. R. P. No. 594 of 1940
November 27, 1940

LAKSHMANA RAO, J.

RAMASWAMI KONAR & another
v.
EMPEROR

Food Adulteration Act (Mad. Act III of 1918)' *s.* 16 (5)—*Analysis by Government Analyst. Where a sample was in fact analysed by the Government Analyst it is not incumbent on the Magistrate to send it again to the Government Analyst under s.* 16 (5), *Madras Prevention of Adulteration Act.*

THE FACTS appear from the following extracts from the judgment of the lower appellate court:

"This is an appeal from the judgment of the Sub-Magistrate, Kumbakonam in C. C. 46 of 40 in which the two appellants have been convicted under s. 5 (1) (b) and (4) of Madras Act III of 1918 and under r. 28 of the rules framed under s. 20 of the Act and sentenced to pay a fine of Rs. 50 each or to suffer one month's simple imprisonment in default.

"The facts are simple. P. W. 1 is the sanitary inspector and purchased for the purposes of analysis one seer of ghee from A-2 who was selling it in the shop of A-1. This ghee was sent to the Government Analyst and certified to contain fat not derived from milk or cream to an extent of at least 15 per cent.

* * *

"The only other point raised in the appeal is that the lower court has not complied with the request of the accused to send the sample left with the accused to the Government Analyst for analysis. There is no provision in the Act for the court to do so; it was for the appellants to take whatever steps were necessary for the conduct of their defence and not for the court to help it in doing so. There is no right under the proviso to s. 16 (5) available to the appellants for the simple reason that there is no separate public analyst for this municipality and the proviso only applies when there is a separate public analyst as distinct from the Government analyst. It was for the appellants to adduce evidence in the lower court to show that the sample sent by P. W. 1 to the Government Analyst was not the sample of the ghee sold by the appellant and this he could very well have done using the sealed part of the purchased ghee given to him by P. W. 1 under s. 15 (1) (b). It is not for the court to take steps to enable him to do so.

"The offence clearly falls under r. 29 for a breach of rule 28 second part".

Petition under ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Kumbakonam dated 11—4—1940 and passed in Cr. App. No. 24 of 1940 (C. C. No. 46 of 1940, stationary sub-magistrate, Kumbakonam)

S. Swaminathan & S. Nagaraja Ayyar, for Petrs.
N. Somasundaram, for Crown.

ORDER

The sample was in fact analysed by the Government Analyst and it was not incumbent on the magistrate to send it again to the Government Analyst under s. 16, cl. 5 of the Madras Prevention of Adulteration Act, 1918 There is therefore no ground for interference with the conviction of the petitioners and the sentence of the first petitioner is not excessive. But the second petitioner is the servant and his fine is excessive. The fine of the second petitioner is therefore reduced to Rupees five and otherwise this petition is dismissed.

N.T.R. *Petition dismissed*

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Cr. M. P. No. 270 of 1940
March 6, 1941

LAKSHMANA RAO, J.

SADASIVA GOUNDER
v.
EMPEROR

Cr. P. C. (V of 1898), *s.* 526—*Cross cases—Complaint by petitioner dismissed under s.* 203—*Transfer.*

A complaint was filed against the petitioner and in respect of the same occurrence the

petitioner also filed a complaint. Petitioner's complaint was dismissed under S. 203, Cr. P. C.

Held, *the petitioner's apprehension by reason of such dismissal that his case had been prejudged cannot be said to be unreasonable and that the case against him should be transferred to another magistrate.*

FACTS: "The petitioner was the 1st accused in C. C. No. 790 of 1940 on the file of the court of the sub magistrate of Thiruturaipundi and accused in C. C. No. 811 of 1940 on the file of the same court. The cases arose out of an occurrence on 1—11—1940 in a village nearby. In respect of the same occurrence petitioner filed a complaint (C. C. No. 884 of 1940) against complainants in the other two cases, to the sub divisional magistrate, who transferred it to the sub magistrate, Thiruturaipundi. The sub magistrate on 24—12—40 dismissed petitioner's complaint under s. 203 Cr. P. C. without examining petitioner or other witnesses. The present application for transfer of C. C. No. 790 of 1940 to the file of some other magistrate was made on the ground that "the order in C. C. No. 884 of 1940 will show that the sub magistrate of Tiruturaipundi has formed opinions strongly adverse to me and the other accused in the cases against us and therefore we apprehend that we may not have a fair and impartial trial in the said cases against us. The sub magistrate has in a way prejudged the said cases as a result of the said order."

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directting the transfer of C. C. No. 790 of 1940 from the file of the court of the sub magistrate of Tiruturaipundi to the file of the court of any other magistrate.

K. Venkataramani, for petr.
A. S. Sivakaminathan, for Crown.

ORDER.

The complaint of the petitioner was dismissed by the sub magistrate under S. 203, Cr. P. C. and his apprehension cannot be said to be unreasonable. The case is therefore transferred to the file of the District Magistrate, Tanjore for disposal by him or such other magistrate as he may direct.

N. T. R.

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Cr. R. C. No. 416 of 1940
Cr. R. P. No. 402 of 1940
October 4, 1940

LAKSHMANA RAO J.

VALLABHAREDDI RAMIREDDY & another
v.
EMPEROR

Forest Act (Mad. Act IV *of* 1882), *S.* 56—*Presumption under—Scope of.*

The presumption under S. 56, Madras Forest Act is expressly restricted to proceedings taken under that Act or in consequence of anything done under that Act and cannot be drawn in a prosecution for an offence under S. 411, I. P. C., when there is no evidence that the timber was stolen from any reserved forest.

FACTS: The case against the petitioners was that four Yepi pillars worth about Rupees 40 which were alleged to have been stolen from a reserve forest were found in the cattle shed of accused 1. It was urged that there was no evidence to show that the pillars were stolen property and witnesses were let in on behalf of the defence who deposed that the pillars had been purchased by accused 2's father more than 10 years ago. The lower court said, "The only question for determination is whether the four pillars in question were purchased by accused 2's father more than 10 or 12 years ago as spoken to by the defence witnesses. Under S. 56 of the Forest Act the presumption is that the timber in question had been stolen from the forest. The burden of proving the contrary rests on the petitioners. The defence evidence must be considered unreliable" and confirmed the conviction under S. 411, I. P. C. The present revision was filed against that order on the grounds.

"(1) In the absence of proof that the timber was stolen property, the conviction of the petitioners for an offence under S. 411, I. P. C. is bad in law.

(2) The lower appellate court erred in drawing the presumption under s. 56 of the Forest Act, in a prosecution for an offence under s. 411, I. P. C.."

Petition under ss. 435 and 439, Cr.P.C. 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Narasaraopet in C. A. No. 22 of 1940—C.C.No. 141 of 1940 on the file of the court of the sub magistrate of Macherla.

P. Basi Reddi, for Petrs.

Public Prosecutor, (*V.L. Ethiraj*), for Crown.

ORDER

The presumption under s. 56 of the Madras Forest Act (Act IV of 1882) is expressly restricted to proceedings taken under that Act or in consequence of anything done under that Act, and there is no evidence in this case that the timber in question was stolen from any reserve forest. The conviction of the petitioners under s. 411, I. P. C. is therefore set aside and the fines if levied will be refunded.

N. T. R. *Conviction set aside.*

Cr. App. No. 149 of 1941
August 14, 1941
HORWILL J.

THE PUBLIC PROSECUTOR
v.
B. V. A. LURY COMPANY represented by
A. V. Raghavaraju, Director & another.

*Companies Act (*VII *of* 1913*), S.* 32*—Failure to send return under—Liability of company.*

For failure to send the return under S. 32 *of the Companies Act, the company is always liable, but the officers of the company are liable only if they knowingly or wilfully authorise or permit the default.*

Dorte v. South African Super Aeration *Ltd.*, 20 *T. L. R.* 425 referred to.

1938 *M. W. N.* 608: *Cr.* 128, *followed.*

Appeal under s. 417, Cr. P.C. 1898, against the acquital of the aforesaid Respondent (Accused) by the Sub Divisional Magistrate of Cocanada in C. C. No. 71 of 1940 on his file.

Public Prosecutor (*V. L. Ethiraj*), for Applt.
D. Narasaraju, for Accused.

ORDER.

Under s. 32 of the Companies Act a company has to draw up a list of the members of the company and of the persons who have ceased to be members since the date of the last return. That list has to be completed within 21 days after the ordinary general meeting and a copy has to be sent, signed by a director or the manager or the secretary, to the Registrar. In this case, whereas the list should have been sent to the Registrar on or before 20-11-39 it was not in fact filed until 3-1-1940. A case was therefore filed against the company and its directors for not complying with the requirements under s. 32 of the Act. The Sub Divisional Magistrate of Cocanada held that there was no reason to think that the failure to submit this return was due to anything but negligence and that as the delay was not due to any wilful default, they were not guilty of offence. He therefore acquitted them. The Crown has preferred an appeal with regard to the acquittal of the company.

The words "knowingly" and "wilfully", which are found to be the necessary ingredients of the offence by the learned Magistrate, cannot be applied to a company at all. A company as a corporate body cannot either "know" or "will". That the legislature did not personify companies and impute to them minds is made clear by the wording of the relevant sections. The punitive clause of s. 32, for example, reads: "If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding Rs. 50 for every day during which the default continues, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty." It is to be noted that the words, "knowingly" and "wilfully" are used with reference only to the officers of the company and not to the company itself, obviously for the reason I have given above. The company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly

or wilfully authorise or permit the default.

Mr. Narasaraju for the respondent has quoted *Dorte* v. *South African Super aeration Ltd.* [1] in which, referring to the English Act, the Alderman held that "the word 'default' in S. 27 implied a continued neglect to do an act required." The English Act has not been shown to me; and so I do not know to what extent, if at all, that case can safely be applied in India; but even if it could, it can be distinguished from the case before me by the fact that a prosecution had been launched apparently against the officers of the company as well as against the company, and also by the fact that in that case the omission was one which it was impossible to remedy. It may be noted that the company had already been fined for not having submitted the required return on the due date, and a daily penalty was also imposed on the company for its subsequent default. It was only when a prosecution was launched after the omission was impossible to remedy that the lower court refused to impose a further penalty.

The only Indian case that has been cited to me is a judgment of Burn, J. in Cr. R. C. No. 601 of 1937, *Sri Meenakshi Mills Co. Ltd* v. *Assistant Registrar of Joint Stock Companies, Madras*, [2] which is a case in which the company and the directors had been fined under S. 76 of the Companies Act. Burn, J. acquitted the officers of the company because in the circumstances of that case he held that it could not be said that they had been 'knowingly parties to the default'; but he upheld the penalty imposed on the company. Precisely the same conditions exist in this case. The learned Magistrate has found that there was no wilful default on the part of the officers of the company and the learned Public Prosecutor is not prepared to dispute that finding. So while the officers of the company were rightly acquitted, the company should have been punished. As far as the company is concerned the order of the magistrate is set aside and the company is ordered to pay a penalty of Rs. 50.

N. T. R.

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1. 20 T.L.R. 425.
2. (1938) M.W.N. 608: cr. 128.

R. T. No. 211 of 1940
Cr. App. No. 859 of 1940

February 3, 1941.

BURN, OFFG. C. J. & HAPPELL, J.

SORIMUTHU PILLAI
v.
EMPEROR

Penal Code (XLV of 1860), *S.* 302—*Murder—Sentence of death or transportation for life—Cirumstances for commuting death sentence into one of transportation for life—Sessions Judge has jurisdiction to do so and not recommend to Government.*

When a Sessions Judge thinks that circumstances exist which would warrant commutation of the death sentence into one for transportation for life, it is not necessary to make a recommendation to the Government. If there are circumstances which justify the imposition of the lesser penalty the sessions judge himself can do so.

THE FACTS are clear from the judgment. The observations of the District Judge relevant to understand the point are as follows:

"18. Before leaving the matter, I would add the recommendation that this is a case in which Government may commute the death penalty. The murder was clearly not premeditated. Though it is not admitted, the probability is that something must have been said or done that morning to drive the accused temporarily frantic: otherwise one must suppose—which is not easy—that he started clubbing everybody in the house the moment he got out of bed. These acts were clearly committed not so much in anger as in grief. The lot of a Hindu widow is hard and Valli, the daughter of the accused, is only a girl about 17 years old. The anguish of a father whose daughter is widowed at that age would be greater than if the girl had died. Anything said or done which would normally be ignored is likely to have a wholly different reaction on a man in that state of mind."

Trial referred by the court of session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 106

of 1940 on 15—11—1940 and appeal by the said prisoner against the said sentence.

V. T. Rangaswami Ayyangar, for accused.
Public Prosecutor (V.L. Ethiraj), for Crown

JUDGMENT.
(BURN, OFFG. C. J.)

The appellant has been convicted by the learned sesssions Judge of Tinnevelly for the murder of his sister Parvathi and for attempting to murder his sister's daughter Gomathi. He has been sentenced to death for the offence of murder and the learned sessions judge has quite properly not passed any separate sentence for the offence of attempting to murder.

The case was a simple one and there was a large number of eye-witnesses. The appellant's daughter Valli (P. W. 10) had been married to Rangayya a son of the appellant's sister Parvathi. Rangayya died on the 25th June 1940 and his body was cremated before the appellant and his daughter Valli could reach the village. The appellant's brother Avadiappa Pillai (not examined as a witness) appears to have said that since Rangayya's body had been cremated, Valli's tali ought to be taken off at once. Valli and her father both objected to this. There were further troubles caused by the fact that Parvathi who was a woman of some means has made a will in which she had expressed her intention of leaving her property in equal shares to her three sons. After the death of Rangayya the accused wanted his sister to make a gift to Valli of the share that would have been given to her husband under the will. Parvathi herself according to the evidence of P. W. 3 refused to comply with this request.

In these circumstances very early in the morning of the 1st July the appellant began to beat the women of the house with a short but heavy rice pounder or pestle (M. O. 1). He struck his sister Lakshmi (P. W. 11). He hit his daughter (P. W. 10). He hit P. W. 5 the daughter of the deceased, Gomathi. He hit his wife Kali (P. W. 9). Then his sister (the deceased) cried out from the kitchen and he went into the kitchen and struck her on the head fracturing her skull. Parvathi died at about 6 p.m. the same night. There were five eye-witnesses (P. Ws. 3, 4, 5, 7 and 8) and the learned sessions judge has left out of account the evidence of P. Ws. 3 and 5 thinking it doubtful whether they could have seen exactly what happened. But he has found no reason to disbelieve the evidence of P. Ws. 4, 7 and 8. Relying upon their evidence the learned sessions judge convicted the appellant for the murder of his sister and fot attempting to murder Gomathi. We think that the conviction arrived at by the learned sessions judge in which he agreed with two of the assessors and disagreed with the other two was correct. But this we think is a case in which we can accede to the plea finally made by learned counsel for the appellant in the matter of sentence. The learned sessions judge in paragraph 18 of his judgment has stated circumstances which we think do afford sufficient ground for mitigating the punishment in this case. He has pointed out that the murder was not premeditated, that there were reasons for disagreement which might very well have provoked a quarrel on the morning of the 1st July and that the unfortunate plight of his daughter Valli must have caused the appellant a considerable amount of pain. These circumstances have moved the learned sessions judge to recommend that in this case the Government might commute the death penalty. It is not necessary in such a case to make a recommendation to the Government. If there are circumstances which justify the imposition of the lesser penalty the sessions judge can do so. Confirming the conviction of the appellant for murder we set aside the sentence of death and sentence him instead to transportation for life. The conviction for attempt to murder also is confirmed.

N. T. R.

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S. A. Nos. 1124 & 1125 of 1938.

August 5, 1941.

ABDUR RAHMAN, J.

Dukka GANGAYYA & another
v.
Buddepu LAKSHMI DEVI*

Cr. P. C. (V of 1898), Ss. 88, Cl. 6 (d) & 386—Claim suit—Parties—Relief.

Respondent obtained an order under S. 488 Cr. P. C. and attached certain quantities of paddy. The paddy was sold and the sale proceeds were lying in court. Plaintiffs preferred claims and on the claims being rejected filed suits for recovery of the money against the respondent.

Held, *(1) the fact that on account of the sale of the paddy plaintiffs asked for a decree for money instead of a declaration did not take the suits out of S. 88, Cl. 6(d), Cr.P.C.*

(2) the paddy having been converted into money the relief that could be claimed was for the money only;

(3) even otherwise, all the necessary facts having been given in the plaint, it was the duty of the court to grant the relief to which the party is found entitled, even if it has not been, by a mistake, asked for by the party; and

(4) by the mere fact that the money was held in court, the Government could not lay claim to the money and that therefore the Secretary of State was not a necessary party to the suits.

Appeals against the decrees of the court of the subordinate judge of Chicacole in A. S. Nos. 326 and 329 of 1937 preferred against the decrees of the court of the district munsif of Sompeta in O. S. Nos. 200 and 201 of 1936 respectively.

G. Chandrasekhara Sastri, for Applts.

B. Jagannadha Das, for Respt.

JUDGMENT

The facts which led to the institution of the two connected suits out of which the present appeals have arisen are simple and may be briefly narrated. The respondent obtained an order under s. 488, Cr. P. C. for maintenance against her husband in M. C. No. 97 of 1933 in the court of the joint magistrate of Berhampore. She got certain quantities of paddy attached in execution of the order passed by that court. After attachment the paddy was stored in two pits. It was subsequently sold by the magistrate and the sale proceeds are lying in that court. The plaintiff in O. S. No. 201 of 1936 is the second wife of the respondent's husband, the plaintiff in the other suit being (her) maternal uncle. Both of them set up a claim to the whole of the paddy attached by the magistrate but their claim petitions were rejected. They consequently brought the two suits. These suits were for the recovery of money either from the magistrate's court or from the respondent in the event of the money having been paid by the magistrate to her (who was the petitioner in M. C. No. 97 of 1933). These suits were dismissed by the district munsif of Sompeta on the ground that the plaintiffs had failed to establish their title. The objection that the suits were not maintainable in their present form was, however, overruled by that court. On appeal the subordinate judge of Chicacole did not go into the question of title but dismissed the appeals on the ground that the suits were not competent as the Secretary of State had not been impleaded as a party to the present suits. In dismissing the appeals on that ground he relied on a decision in *The Secretary of State for India in Council* v. *Jagat Mohini Dasi* (1). The plaintiffs had consequently preferred the present appeals which may be disposed of by one judgment.

The contention advanced on behalf of

*1941 M.W.N. 865

1. (1902) 28 Cal. 540.

the respondent is that the plaintiffs should have asked for a declaration to the effect that the order passed in the claim proceedings was incorrect and should be set aside. Since, it is contended, the suits are not for declaration, they are not competent. It is contended in the alternative that in so far as money was lying in the court of the joint magistrate and as long as that money was not paid, it was or must be deemed to be at the disposal of the Secretary of State, the latter, that is the Secretary of State should have been made a party to the suits.

There is no force, in my opinion, in either of these contentions. No rules have been framed by the local government under S. 386, Cr. P. C. and it is therefore urged that the provisions of S. 88 of that Code must be held to be applicable. But even if that contention is assumed to be correct it would not help the respondent. There is a distinct provision in s. 88, Cl. 6 (D) which entitles a 'party whose claim or petition has been disallowed in whole or in part to go and institute a suit to establish the right which he claims against the property in dispute and that is exactly what the plaintiffs in both the suits are trying to do. The mere fact that on account of the sale of the paddy, they have asked for a decree for money instead of a declaration does not take these suits out of the category of the suits contemplated by s. 88, Cl. 6(D) Cr. P. C. It must not be overlooked that the money which has been realised although capable of being realised as fine under s. 488, Cl. (3) is not in fact a fine itself and is not being held by or at the disposal of the Government for its own purposes, but with the object of paying maintenance to the person in whose favour the order was passed. The Government cannot and does not lay any claim to any portion of the money thus realised. It is therefore futile to argue that the Secretary of State was interested in the decision whether the property attached at the instance of the respondent belonged to her, and should have been for that reason impleaded. The only party who is interested in the result is the respondent and the suit was instituted against her. There is therefore no force in the contention that the suit should have been against the Secretary of State and since the Secretary of State was not impleaded as defendant, is not maintainable.

I cannot understand the ground on which the lower appellate court dismissed the plaintiffs' suits. The decision in *The Secretary of State for India in Council* v. *Jagat Mohini Dasi*(1), had absolutely no application to the facts of the present case. As for the contention that the suits should have been for declaration the answer is simple. First of all the paddy having been converted into money, the relief that should have been and is being claimed on behalf of the plaintiff, is for that money itself. But conceding for the sake of argument that the contention of the learned counsel for the respondent is correct all the necessary facts have been given in the plaint and it is the duty of the court to grant the relief to which a party is found entitled even if it has not been by a mistake asked for by the party.

Both these contentions therefore fail. The appeals must consequently be accepted and the suits sent back to the lower appellate court for disposal of the appeals on their merits. It is unfortunate that the lower appellate court did not go into the question of title at the same time. Had that been done a further delay would have been avoided. The costs in these appeals both in this and the lower appellate court will be costs in the cause.

The court fees in these appeals may be refunded to the appellants.

N.T.R.

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Cr. R. C. No. 503 of 1941
Cr. R. P No. 474 of 1941

August 13, 1940

HORWILL, J.

NAINAMALAI GOUNDAN & others
v.
RAMASAMY GOUNDAN*

Cr. P. C (V of 1898), S. 144, (1)—Jurisdiction of superior magistrate to re-inquire where the subordinate Magistrate has refused to pass an order.

The Sub Divisional Magistrate has ample power to pass an order under Cl. (1) of S. 144, Cr. P. C. even where a subordinate Magistrate has refused to pass an order on the same information. An independent enquiry by the Sub Divisional Magistrate is not necessary.

The order of the Sub Divisional Magistrate in this case ran as follows:

"This is a petition for an order under S. 144, Cr. P. C. The subject matter was before the Stationary Sub Magistrate, Rasipur and he after enquiry refused to pass an order as he did not find sufficient grounds to do so. The matter has therefore been taken up to this Court and the petitioner contends that the lower court had failed to appreciate the facts of the case and the evidence both oral and documentary.

The respondents contend that after the matter has been disposed of by a competent court (Stationary Sub Magistrate Rasipur)—this Court has no jurisdiction to enquire into and pass an order on the same matter. But the learned Advocate for the respondents has not been able to show me any authority in support of his contention. I studied carefully the wording of the whole S. 144, Cr. P. C. and I find nothing which prohibits a superior Magistrate from re-enquiring the matter and making an order under S. 144 (1) Cr. P. C. when a Subordinate Magistrate had already refused to pass an ordrer on the same matter. The objection is therefore overruled and the enquiry will proceed."

Petition under Ss. 435 & 439, Cr.P.C., 1898 praying the High Court to revise the order of the Court of the Sub Divisional First Class Magistrate, Nammakkal dated 13—5—1941 and made in M. C. No. 3 of 1941 (M. C. No. 3 of 1941, Stationary sub magistrate's Court, Rasipur).

N. Somasundaram, for Petrs.
K. E. Rajagopalachari, for Respt.
Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The Sub Divisional Magistrate had ample power under Cl. (1) of S. 144, Cr. P. C., to pass the order he did.

The Sub Divisional Magistrate is responsible for preserving law and order within his jurisdiction and if on the material available to him he thinks that an order under S. 144, Cr. P.C, is necessary, it is his duty to pass such an order. Whether the material is gathered by himself or by the Sub Magistrate is irrelevant.

The petition is dismissed.

T. *Petition dismissed.*

*1941 M.W.N. 867 (1)

C. R. P. No. 1804 of 1939

August 13, 1941

BURN, J.

SYED ISMAIL SAHIB alias Syed Tahsildar Sahib & another
v.
ETHIKASHA SARGURU alias Syed Chandhu Sahib & another.*

Mussalman Wakf Act (XLII of 1923), S. 10—Offence — Jurisdiction of court — District judge has no power to impose fine—Cr.P.C. (V of 1898), Ss. 4 & 29.

Under S. 10 of the Mussalman Wakf Act, XLII of 1923, if a mutawalli has not complied with the provisions of the Act, the district judge is not empowered himself to impose a fine. Under Ss. 4 and 29, Cr.P.C. the court which could try these offences is the court indicated in the Cr. P. C.

54 All. 475, 37 Bom. L. R. 207 & A.I.R. 1937 Nag. 135 dissented from.

I.L.R. 1941 Lah. 395 followed.

Quaere: *Whether the district judge has jurisdiction to hold an enquiry into the nature of the property where the alleged mutavalli denies the existence of the wakf?*

*1941 M.W.N. 867 (2)

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the district court of Madura dated 4—4—1939 and made in O. P. No. 60 of 1938.

K. Bhashyam & T. R. Srinivasan, for Petrs.

S. Panchapakesa Sastri & G. Srinivasa Iyengar, for Respt.

JUDGMENT

This is an application to revise the order passed by the learned district judge of Madura in O. P. No. 60 of 1938. That original petition was filed under S. 10 of the Mussalman Wakf Act XLII of 1923, desiring the lower court to punish the respondents by way of fine for failure to discharge their duties under the Wakf Act in connection with a darga called Hazrat Mohait Shaw Durga at Anuppanady Village, near Madura. The respondents denied that any such wakf existed, and pleaded that it was only a criminal court that could impose the fine indicated under S. 10 of the Act. The learned district judge thought that it was the district court that had the jurisdiction to impose the fine, but held that since the wakf itself was denied, it was not competent for him to hold an enquiry into that matter.

With regard to the first point, I am of opinion that the learned district judge has not come to the correct conclusion. He relied upon the decisions in *Nasrullah* v. *Wajid Ali* [1], *Kalekan* v. *Karim* [2] and *Abdul Hadi* v. *Abdul Latif* [3]. But in all these decisions it is noticeable that the learned Judges have pronounced their decisions rather with reference to, what they consider to be "the scheme of the Act" than with reference to the wording of its provisions. In S. 2 of the Mussalman Wakf Act XLII of 1923 "court" is defined as "the court of the district judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such court, subordinate to the High Court, as the Local Government may, by notification in the local official Gazette, designate in this behalf." The arguments which weighed with the learned judge in the cases referred to was that the district court is burdened with all the duties under this Act, and therefore the district court must be the court which can impose the fine provided in s. 10. This, however, with all respect, is in my opinion not sound. S. 10 of the Act simply says that any person who is required to perform certain duties shall, if without reasonable cause he fails to perform those duties, be punishable with fine which may extend to Rs. 500 or in the case of a second or a subsequent offence with fine which may extend to Rs. 2,000.

Now under s. 4, Cr. P. C. "offence" means any act or omission made punishable by any law for the time being in force. It is clear therefore that s. 10 of the Wakf Act creates an offence, and indeed it says in so many words that the omission described is an offence. S. 29 Cr.P.C. runs as follows:

"(1) Subject to the other provisions of this Code any offence under any other law (that is any law other than the I.P.C.) shall, when any court is mentioned in this behalf in such law, be tried by such court.

(2) When no court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

There is no mention in the Wakf Act of any court as a court which shall impose the punishment provided in s. 10. In other words there is no court mentioned as the court which shall try offences under s. 10. It follows therefore that the court which can try those offences is the court indicated in the Cr. P. C.

I may say that, in my opinion, it would be contrary to all principle that the court of the district judges should have the power to punish offences under s. 10 of the Wakf Act with fine. In any such case the court of the district judge would be virtually in the position of prosecutor and judge at the same time. I find myself, therefore, with all respect, unable to agree with the learned judges who decided the cases already quoted. I would prefer to follow, with respect, the decision of a Full Bench

1. (1932) 54 All. 475
2. (1935) 37 Bom. L. R. 207
3. (1937) A.I.R. Nag. 135

of the Lahore High Court in *Shia Youngmen's Association, Punjab* v. *Fateh Ali Shah* (4). The Full Bench there answered in the negative the question whether, in case the *mutavalli* has not complied with the provisions of the Act, the district judge is empowered himself to impose a fine on him.

In the same judgment the Full Bench of the Lahore High Court decided that in proceedings under s. 10 of Act XLII of 1923, the district judge has no jurisdiction to hold an enquiry into the nature of the property where the alleged *mutawalli* denies the existence of the *Wakf*. This is important support for the view taken by the learned district judge in the order which I am asked to revise. But it is not necessary for me to discuss that question at length since learned counsel for the petitioners agrees that if a decision on the other point is against the petitioners, the application to the district court must be considered to have been rightly dismissed.

This application to revise the order of the learned district judge therefore fails and is dismissed with costs.

T. *Petition dismissed*

Cr. R. C. No. 316 of 1941

Cr. R. P. No. 300 of 1941

August 21, 1941

HORWILL, J.

MOONGAN & others.

v

MIR ROSHAN ALI SAHIB*

Cr. P. C. (V of 1898), Ss. 239 & 537—Misjoinder—Effect.

Petitioners entered into a forest which had been leased to the complainant and cut certain trees. They were all tried together, although separate charges were framed with regard to two sets of the accused who were cutting trees in different parts of the forest and were convicted.

Held, *there was a misjoinder of parties.*

On the question whether the fact that all the accused were tried at one trial is sufficient ground for setting aside their conviction and ordering a retrial,

Held, *the position on the case law was not clear. But where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused had been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a misjoinder of accused there is always a possibility that the court will be unconsciously prejudiced by evidence that would be irrelevent if the accused were tried separately.*

25 Mad. 61 P. C., (1927) M. W. N. 103 = 5 Ran. 53 P. C., (1930) M. W. N. 377: Cr. 97 = 53 Mad. 937, 1936 M.W.N. 1095; Cr. 195, 1936 M.W.N. 839; Cr. 163 & 1935 M.W.N. 1286 : Cr. 230 referred to.

Petition under Ss. 435 & 439 Cr.P.C., 1898, praying the High Court to revise the Judgment of the court of the Joint Magistrate of Hosur dated 19—12—1940 and made in C. A. No. 50 of 1940 preferred against the Judgment of the Court of the Stationary Sub Magistrate of Krishnagiri in C. C. No. 1121 of 1940.

K. S. Jayarama Ayyar, G. Gopalaswami & V. V. Radhakrishnan, for Petrs.

V. T. Rangaswamy Ayengar, K. S. Sundaram & M. R. Ramachandra Pant, for Respt.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

All the petitioners entered into a forest which had been leased to the complainant and cut certain trees. They were all tried together, although separate charges were framed with regard to two sets of the accused who were cutting trees in different parts of the same forest. They have all been convicted, In this petition it is contended on behalf of the petitioners that there was a misjoinder of persons and that the conviction is therefore illegal and should be set aside.

Although the matter was taken in appeal, neither of the courts say that there was any intention or object common to the two sets of persons cutting trees in different parts of the forest; so that I agree with the learned advocate for the petitioners—as well as

4. (1941) I.L.R. Lah. 395 F.B.

*1941 M.W.N. 869

with the learned Public Prosecutor—that there was a misjoinder of parties, Mr. V. T. Rangaswamy Ayyangar for the complainant contends that there was no misjoinder and quotes *Sambasiva Mudali In re* (1), but it is clear from the Judgment in that case that Pandalai, J. was satisfied that the two acts complained of—although on different dates—were parts of the same transaction and that the object on the two occasions was the same.

The only other question that arises in this case is whether the fact that all the accused were tried at one trial is a sufficient ground for setting aside their conviction and ordering a retrial. For many years after *Snbramania Iyer* v. *King Emperor* (2), it was held that any disobedience or failure to comply with the mandatory provisions of the Criminal Procedure Code was an illegality that vitiated the conviction. That was a case in which there was a misjoinder of causes of action, and a Full Bench of this court held that there was a misjoinder but that it was open to them to strike out the first count, to reject the evidence with regard to it, and to deal with the evidence on the remaining counts of the indictment. But their Lordships of the Privy Council held that the disregard of any express provisions of law as to the mode of trial was not a mere irregularity such as could be remedied by S. 537, Cr. P. C. and that such a phrase as 'irregularity' was not appropriate to the illegality of trying an accused person for more, or different, offences at the same time, if those offences were spread over a longer period than a year. In 1927 a case *Abdul Rahman* v. *King Emperor* (3), was considered by the Judicial Committee in which the depositions of witnesses had not been read over in the presence of the accused as required by S. 360, Cr. P. C. It was held that this was a mere irregularity curable under S. 537 of the Code. This decision showed that a mere disregard of the mandatory provisions of the Code did not necessarily vitiate a conviction; but it left it rather difficult to say whether in a particular case a disregard of a mandatory provision amounted to an illegality or was a mere irregularity. Burn, J. in *Bomman Chetti* v. *Emperor*[4] which dealt with a misjoinder of charges, referred to the failure to obey a mandatory provision of the Code as an 'irregularity,' but added that it was not one of the kind indicated by their Lordships of the Privy Council in *Abdul Rahman* v. *King Emperor* (3). In *Subramania Reddi* v. *Emperor* (5), five persons were tried together: but there should have been two trials, one for the first accused and one for accused 2 to 5. The accused 2 to 5 were however acquitted: and it was therefore argued there that no prejudice had resulted to the first accused. Burn, J. however held that

> "The joint trial was illegal and the illegality could not be cured by the acquittal of accused 2 to 5 of the offences under which they were charged".

In *Karuppa Goundan* v. *Emperor* (6) in which there was a misjoinder of causes of action, King, J. held that it was not a mere irregularity such as was referred to in *Abdul Rahman* v. *King Emperor* (3) and that the trial and conviction were therefore illegal. None of these cases decided by single judges however refer to *Ramaraja Tevan In re* (7) in which the effect of a misjoinder of persons was considered. There, Wallace & Jackson, JJ, say

> "Ever since the pronouncement of the Judicial Committee in *N. A. Subramania Iyer* v. *King Emperor* (2) it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge, the court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real ground for any such assumption and the Judicial Committee itself, when it had occasion to refer to *N. A. Subramania Iyer* v. *King Emperor* (2) in *Abdul Rahman* v. *King Emperor* (3), clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case, the Code was clearly infringed but the curative provision of S. 537 was considered a sufficient remedy."

1. (1932) 35 L.W. 98
2. (1902) 25 Mad. 61 P.C.
3. (1927) M.W.N. 103 ; 5 Rang. 53 P.C.
4. (1936) M. W. N. 1095 : Cr. 195.
5. (1936) M. W. N. 839 : Cr. 163
6. (1935) M. W. N. 1286 : Cr. 230.
7. (1930) M. W. N. 377 : Cr. 97 ; 53 Mad. 937.

So the position is not altogether clear even today although *Ramaraja Thevan, In re,* (7) is not binding on me, because the above-quoted remark as obiter, it being found that in fact there was no misjoinder. But the purpose of the legislature in laying down various restrictions with regard to charges against a number of persons or against the same person of different charges was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence with regard to a number of accused: and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a misjoinder of accused, there is always a possibility that the court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. It is not necessary to disagree with the above quoted opinion from *Ramaraja Thevan, Ie re.* (7), and to say that a misjoinder always vitiates a trial: but I think that a court should ordinarily presume prejudice until it is quite certain that there could have been none.

In the present case, apart from the presumption of prejudice, the trial Magistrate —and even the appellate Magistrate—seemed to be of opinion that it was not proper to try the two sets of accused separately and that was why the trial Magistrate framed separate charges. He however erroneously thought that in doing so and in allowing each batch of accused to recall and cross-examine the prosecution witnesses separately, he was giving them separate trials. Mr. V. T. Rangaswamy Ayyangar does not deny that there was in fact only one trial and not two. It is conceded by Mr. Jayarama Iyer that the two sets of accused were animated each with a common intention if the prosecution story is true and so he demands only two trials and not a trial for each accused separately.

The petition is therefore allowed, the convictions and sentences set aside, and the case remanded for fresh and separate trials of the two sets of accused by the District Magistrate himself or by some other Magistrate subordinate to him other than the Magistrate who tried the case.

N.T.R. *Petition allowed.*

Cr. R. C. No. 856 of 1940

Cr R. P. No. 809 of 1940

January 17, 1941

LAKSHMANA RAO, J.

V. S. Sharma

v.

J. Dharma Rao, Proprietor M. C. Appaswamy Chetty & Co.*

Copyright Act (III of 1914) Ss. 7 & 8—Complaint cannot be dismissed on the ground that it is of a civil nature.

Where the complaint discloses an offence under Ss. 7 and 8 of the Indian Copyright Act the lower court cannot dismiss the complaint on the ground that the dispute is of a civil nature.

The facts appear from the judgement of the lower court which was as follows:

"The complainant charges the accused J. Dharma Rao with having deliberately infringed his copyright in the block relating to two pictures of Sri Kapaleeswarar and Sri Karpagambal and two more pictures in black and white concerning the story of Mylapore temple. The complainant executed the pictures in question on 16–3–1938 and entrusted them with the accused the work of making of blocks of originals first. According to the complainant a sum of Rs. 40 is due payable to the accused. The accused had delivered all the infringed pictures but had kept the blocks belonging to the complainant pending the full payment of the balance due. The complainant says that he learnt in December 1939 that the accused has been clandestively using the said block to print more pictures. The dispute is about the return of the block given to the accused in March 1938. The dispute is purely of a civil nature and I see no sufficient ground

*1941 M.W.N. 871

to proceed further and I dismiss the complaint under S. 203, Cr. P. C."

Against this order the present revision was filed.

Petition under Ss. 435 and 439 Cr. P. C., 1898, praying the High Court to revise the order of the Second Presidency Magistrate of the Court of the Presidency Magistrates George Town, Madras, dated 15—7—1940 and made in C. C. No. 1029 of 1940.

T. R. Venkataraman, for Petr.

P. Srinivasa Ayyangar, for Respt.

Crown Prosecutor (*P. Govinda Menon*), for Crown.

ORDER.

The complaint discloses an offence under Ss. 7 and 8 of the Indian Copyright Act and its dismissal on the ground that the dispute is of a civil nature cannot be sustained. The order of dismissal is therefore set aside and there will be a further inquiry into the complaint in accordance with law by the Chief Presidency magistrate or such other Magistrate as he may direct.

T.

R. T. No. 205 of 1940

Cr. Apps. Nos. 851 and 877 of 1940

January 22, 1941.

BURN OFFG. C. J. & HAPPELL., J.

EMPEROR
v.
VAYANAKUNNU VEDAN*

Penal Code (XLV *of* 1860), *S.* 302—*Charge of murder against second accused and of abetment against accused* 1 *and* 2—*Accused* 1 *shouting* '*இருத்துடா*'—*Meaning of*—*Accused* 3 *fetching the spear used by* 2*nd accused to kill*—*Offence committed.*

In the course of a quarrel between deceased and first accused deceased used very insulting language. First accused addressing his sons accused 2 *and* 3 *instigating to attack deceased, used the words* '*இருத்துடா*'. *Third accused fetched a spear and second accused stabbed the deceased with the spear. The* 2*nd accused was convicted of murder and sentenced to be hanged.* 1*st and* 3*rd accused were convicted of abetting the murder and sentenced to transportation for life.*

Held, (*1*) *the word* '*இருத்து*' *means suppress or knock down and does not mean stab and the* 1*st accused is not guily of abetment of murder.*

(2) *In the absence of evidence that the third accused had the intention of putting an end to deceased's life he cannot be convicted for abetment of murder merely because he fetched the spear.*

(3) *Second accused was guilty of murder but the insulting language used by deceased though not enough to entitle him to the benefit of the first exception to S.* 300 *was a mitigating circumstance to reduce the sentence to one of transportation for life.*

Trial referred by the Court of Sessions of the Ramnad Division for confirmation of the sentence of death passed on 11-11-1940 upon the said prisoner in C.C. No. 101 of 1940 and Appeal by the accused Nos. 1 and 3 against the sentences of transporation for life passed on them and also the sentence of rigorous imprisonment for two weeks passed upon accused No. 1 in the said Sessions Case No. 101 of 1940.

E. T. Chockammal, for Accused.

Public Prosecutor (*V. L. Ethiraj*), for Crown

JUDGMENT

(BURN OFFG, C. J.)

These appellants were tried jointly in S. C. No. 101 of 1940 by the learned Sessions Judge of Ramnad. The appellant in C. A. No. 851 was the 2nd accused in the case. The appellants in C. A. No. 877 were the 1st and 3rd accused. The 1st accused is the father of the other two. The 2nd accused was charged with having murdered his uncle Sivalinga Vedan on the 1st August, 1940 by stabbing him with a spear. The 1st and 3rd accused were charged with liability for the same murder under s. 34 read with s. 302, I. P. C. There was a separate charge against the 1st accused of causing simple hurt to Sivalinga Vedan.

The occurrence was witnessed by many persons in the village of Agraharapatti. There was a quarrel between the 1st accused and his brother sivalinga Vedan of about 12 months standing. On

*1941 M.W.N. 872

the 1st August Sivalinga Vedan who had been away from home and returned the previous day accused his brother (the 1st accused) and his brother's sons (the 2nd and 3rd accused) of having set his house on fire. They denied it and he challenged them to take an oath, When they refused to take the oath, Sivalinga Vedan said to the 1st accused "if you won't take the oath, you must give your wife to me". The 1st accused became very angry at this insult and struck his brother on the shoulder with a stick and there was a scuffle between Sivalinga Vedan and the three accused. They were separated by another brother of the 1st accused and some bystanders but after they had been separated the 1st accused is said to have instigated his sons to stab their uncle. The words used by the 1st accused according to the prosecution witnesses are "He has asked for my wife. You are looking on. Stab that *thayoli.*" Thereupon the 3rd accused who is a youth of 17 or 18 ran to the house and fetched a spear and when he came back the 2nd accused snatched the spear from him and stabbed his uncle in the chest causing his death almost instantaneously.

These facts were proved by the evidence of a large number of witnesses—P. W. 4 the widow of the deceased, P. W. 5 the brother of both the 1st accused and the deceased, P. W. 6 the headman of the neighbouring village and P.Ws. 7, 8, 9 and 10, the neighbours. P. W. 10 disarmed the 2nd accused after striking him with a stick and P. W. 5 bit the 2nd accused on the arm in the early part of the struggle. Another witness (P. W. 11) just saw the stab inflicted on the deceased. He then became afraid and ran home. The three accused at once took refuge in their house, bolted themselves in and refused to come out until they were fetched out by the police. There is no doubt about the facts and on these facts the learned Sessions Judge has convicted the 2nd accused for the murder of his uncle and sentenced him to death. He has convicted the 1st and 3rd accused of abetment of the murder and has sentenced them to transportation for life. He has also convicted the 1st accused of causing simple hurt on grave provacation (s. 334 I.P.C.) and has sentenced him for that offence to rigorous imprisonment for two weeks.

Learned Counsel for the 2nd accused has attempted to convince us that her client was not guilty of murder. She contends that upon the facts proved we ought to hold that the 2nd accused was gravely and suddenly provoked to such an extent that he lost his self control and that he is therefore entitled to the benefit of the first exception to S. 300, I.P.C. Having perused the evidence we find ourselves unable to accept this contention. It does not appear, although the language of the deceased was insulting, that the 2nd accused was provoked thereby so as to lose his self-control. It was in fact the appeal to his sons made by the 1st accused that stimulated them to action after they had been separated from the deceased in the first quarrel. We must therefore agree with the learned Public Prosecutor and the learned Sessions Judge that the 2nd accused has been rightly convicted of murder. His offence does not fall within any of the exceptions to S. 300 I.P.C. The stab which he inflicted pierced his uncle's chest and killed him almost at once. We think however that this is not a case in which it is necessary to confirm the sentence of death. There are undoubtedly mitigating circumstances. The language of the 2nd accused's uncle was very insulting and it was that that provoked the quarrel which ended in the death of Sivalinga Vedan. We set aside the sentence of death and sentence the 2nd accused instead to transporation for life.

As for the appeal of the 1st and 3rd accused, we can find no reason to interfere with the conviction of the 1st accused under S. 334, I.P.C. or the sentence imposed for that offence. But we cannot support the conviction of the 1st and 3rd accused for abetment of murder. The learned Public Prosecutor with his usual fairness has pointed out to us that there is really no case of abetment of murder against the 1st and 3rd accused. All the eye-witnesses, it is true, have said that the 1st accused addressing his sons instigated them to stab his brother Sivalinga Vedan but when we look at the earliest record in the case made by the Village Munsif (P. W. 12) within half-an-hour after the occurence we find reason to doubt whether the 1st accused really told his sons to stab his brother. The words used by the widow (P. W. 4) when she gave her statement (Ex. G) to the village munsif are "இருத்துடா தாயோழியே", "இருத்துடா" does not mean "stab" although the Village Munsif when questioned by the Court said that in rural parts it had the same meaning as

"போடுடா" and was equivalent to "stab". We have consulted the Court Interpreter and also the Tamil Lexicon and we can find nothing to corroborate this statement of the Village Munsif. The nearest meaning of "இருத்து" to stabbing is given in the Lexicon as "to drive in, as a nail; to beat down, as a floor; to make firm or compact by beating." It really therefore means "suppress" or knock down but it does not mean stab. Even if the 1st accused had used the common word for stab namely குத்துடா we should have been reluctant to say that he must be deemed to have meant his sons to kill their uncle. The quarrel between the brothers was over a matter of Rs. 2. It was a quarrel a year old and there was nothing that could have made the 1st accused want to take his brother's life or to instigate his sons to do so. As for the 3rd accused the evidence is that he fetched a spear. But the evidence also is that when he brought the spear he did not use it. It is impossible therefore to say that the 3rd accused has been proved to have had the intention of putting an end to his uncle's life. We shall therefore set aside the conviction of the 1st and 3rd accused (appellants in C.A. No. 877) for abetment of the murder of their uncle and the sentence of transporation for life passed upon them. They must be set at liberty forthwith.

N.T.R.

R. T. No. 23 of 1941

Cr. App. No. 101 of 1941

March 19, 1941

BURN & MOCKETT, JJ.

EMPEROR

v.

RAMA GOUNDAN alias Kolanda Goundan*

Penal Code (XLV of 1860), Ss. 302 & 201—Accused convicted of murder and of concealing evidence thereof—Whether a separate sentence for concealment desirable and necessary.

The sessions judge convicted the accused of murder and sentenced him to be hanged. He also convicted him of concealing the evidence and sentenced him to 7 years rigorous imprisonment. While as a strict question of law it may not be wrong, it is highly unusual and undesirable. This is a case where the whole question is whether the man was guilty of murder, and it was not suggested the murder was committed by anybody else. Hence the procedure in the lower court should not be treated as a precedent.

FACTS: The relevant portion of the sessions judge's judgment was as follows: "All the assessors are of the opinion that the accused is guilty of both the charges under ss. 302 and 201, I.P.C. I agree with their opinion and find the accused guilty under ss. 302 and 201, I.P.C.

Under s. 201, I.P.C. the accused is sentenced to seven years' rigorous imprisonment. There are no extenuating circumstances in the case. The accused has killed the deceased by inflicting most brutal injuries upon him. Under s. 302, I.P.C. the accused is sentenced to be hanged by the neck until he is dead."

Trial referred by the additional sessions judge of the court of session of the Coimbatore division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 210 of 1940 on 17—1—1941 and appeal by the prisoner against the said sentence and the sentence of seven years rigorous imprisonment under s. 201 I.P.C. passed upon him in the said case.

K. S. Jayaram, for Accused.

Public Prosecutor, (*V. L. Ethiraj*) for Crown.

JUDGMENT

(MOCKETT, J.)

The appellant has been convicted of the murder of his cousin and has been sentenced to death by the learned additional sessions judge of Coimbatore. There is no question that on the 24th September last Parama Goundan was murdered. His body was exhumed on the 2nd October from the garden of the accused.

* * *

In these circumstances we think that the learned sessions judge quite rightly drew the inference from these facts that the accused deliberately murdered his cousin and quite rightly rejected the story told at a somewhat late stage and only when the body was revealed that it was done in a manner which might have reduced this offence to some lesser offence. The whole of the circumstances in this case point to the fact that for some reasons which may not ever be ascertained this was a deliberate murder and a deliberate attempt at concealment. We therefore confirm the conviction and dismiss the appeal. Similarly in a case of this sort the sentence passed was the appropriate sentence and that also is confirmed.

* 1941 M.W.N. 874

We notice that the learned judge whilst convicting of murder has also convicted the appellant and sentenced him to seven years rigorous imprisonment for concealing the evidence. Whilst as a strict question of law this may not be wrong, it is in our view highly unusual and undesirable. This is a case where the whole question was whether this man was guilty of murder. It was not suggested the murder was committed by anybody else and we think that the procedure in the lower court should not be treated as a precedent in that court.

T. *Appeal dismissed.*

Cr. App. No. 317 of 1940

August 22, 1940

LAKSHMANA RAO, J.

Jalakam VENKATASUBBADU

v.

EMPEROR*

Criminal Tribes Act (*VI of* 1924), *s.* 23 (1) (*b*)—*Special reason to award lesser sentence.*

Where accused, a member of a criminal tribe, was previously convicted and sentenced to 7 years R. I., the fact that there was an interval of about 5 years between his coming out of the prison and the commission of the present offence is 'a special reason to the contrary' within the meaning of s. 23, Criminal Tribes Act, for awarding a lesser sentence than transportation for life.

The facts appear from the judgment of the lower court which was as follows:

"The accused is charged under ss. 397 and 324 I.P.C. The case against him is that on the night of 15—11—1939, he committed theft of a brass chembu and a bundle containing various articles belonging to one Sadhu Jagannath Das at Kodur Railway Station, and that when Sadhu Jagannath Das caught him with the stolen properties, he stabbed him with a dagger. As it appears from the record that the accused was in possession of the stolen properties and was trying to walk away with them at the time he stabbed Sadhu Jagannath Das, the offence amounts to robberry, and charges have been framed under ss. 397 and 324 I.P.C. The accused pleads guilty to both the charges. He also stated in the lower court that he had committed the offence. I am satisfied that he has understood the offences with which he is now charged, and convict him on his plea of guilty.

Both the offences with which he is now convited are specified in Sch. I of the Criminal Tribes Act of 1924. A further charge under S. 23 (1) (b) of the Criminal Tribes Act has been framed against the accused, as he was previously convicted in S. C. No. 7 of 1928 of this Court, under S, 23 (1) (a) of the Act. He pleads also guilty to this charge, and I convict him accordingly.

The accused was sentenced to rigorous imprisonment for 7 years in S. C. No 7 of 1928 of this Court, and he has committed the present offence within a short period after his release. There appears no reason why he should not be punished with the minimum sentence prescribed by S. 23 (1) (b) of the Criminal Tribes Act. I therefore sentence him to transportation for life."

Appeal against the order of the court of session of the Cuddapah division dated 26—2—1949 in C. C. No. 4 of 1940.

Accused not represented.

K. Venkataraghavachari, for Crown.

JUDGMENT

The appellant has been convicted under Ss. 397 and 324 I.P.C. and S. 23, Cl. (1) (b) of the Criminal Tribes Act and sentenced to transportation for life.

The appellant pleaded guilty to the charges and there is no ground for interference with the conviction. But his last conviction was on 12th March, 1928, when he was sentenced to rigorous imprisonment for 7 years, and the present offence was committed on 15th November, 1939. There was thus an interval of about 5 years between his coming out of person after serving his last sentence and the commission of the offence, and as held in *In re Karuppa Tevan* (1) this is a special reason to the contrary within the meaning of S. 23 (1) (b) of the Criminal Tribes Act for awarding a lesser sentence than transporation for life. This was overlooked by the sessions judge and having regard to all the circumstances a sentence of rigorous imprisonment for 7 years would suffice. The sentence is therefore reduced to rigorous imprisonment for 7 years and otherwise the appeal is dismissed.

T. *Sentence reduced.*

*1941 M.W.N. 875

1. (1930) 53 Mad. 80

Cr. App. No. 353 of 1941

August 28, 1941

BURN, J.

Debbala Koricha NAGADU & another
v.
EMPEROR*

Criminal Tribes Act (VI *of* 1924), *S*. 23. (1)—*Reasons to the contrary—Seven years out of jail since last conviction, a special circumstance.*

Where the appellant a member of a criminal tribe had been previously convicted of one of the offences specified in Sch. I to the Criminal Tribes Act, it is obligatory upon the sessions judge under S. 23 (1) (*a*) *of the Act to pass a sentence of imprisonment for a term of not less than seven years but this mimimum sentence is to be imposed "in the absence of special reasons to the contrary which shall be stated in the judgment of the court"*

Where the last conviction of the appellant was in 1933 *of house breaking and theft and he was sentenced to rigorous imprisonment for six months but had been out of jail for at least seven years after his last conviction, this may be considered to be a reason to the contrary under S.* 23 (1) *to impose a lesser sentence.*

Appeal against the order of the Court of session of the Anantapur Division in C. C. No. 10 of 1941.

Accused not represented.
Publie Prosecutor (*V. L. Ethiraj*), for Crown.

JUDGMENT

These two appellants have been convicted of offences under Ss. 457 and 380 I. P. C. They were tried by jury and the verdict of the jury was unanimous. So far as the second appellant is concerned his appeal was dismissed summarily under S. 421 Cr. P. C. The case of the first appellant alone comes up for consideration because of the sentence of seven years R. I. passed upon him.

There is no allegation of misdirection and the charge to the Jury shows no signs of misdirection. There is therefore no appeal on the facts. The sentence of seven years R. I. has been passed by the learned Sessions Judge because the first appellant was a member of a criminal tribe who had been previously convicted of one of the offences specified in Sch. I appended to the Criminal Tribes Act. It was therefore obligatory upon the learned Sessions Judge under s. 23 (1) (a), Criminal Tribes Act to pass a sentence of imprisonment for a term of not less than seven years. The learned Judge however has apparently overlooked the provisions in s. 23 (1) that these minimum sentences are to be imposed "in the absence of special reasons to the contrary which shall be stated in the judgment of the court". The learned Sessions Judge has not stated that there were no special reasons tc the contrary in this case. Now we fiud that the last conviction of the first appellant was in C. C. 148 of 1933 on the file of the Stationary Sub Magistrate, Tadpatri, when he was convicted of house breaking and theft and sentenced to R. I. for six months. From that it is clear that the first appellant had been out of jail for at least 7 years after his last conviction and that may very well be considered to be a reason to the contrary under s. 23 (1). (Vide the decision in *In re Sami Karuppa Thevan* (1). Taking this view I set aside the sentence of seven years R. I. passed upon the 1st appellant and sentence him instead to R. I. for two years. The amount of property stolen was not worth more than Rs. 17 and no serious injury was inflicted by the first appellant though it is said that he used a stick and therefore he deserves a severer punishment than the second appellant.

T. *Sentence reduced.*

*1941 M.W.N. 876

1. (1930) 53 Mad, 80.

R. T. No. 59 of 1941

Cr. App. No. 233 of 1941*

July 23, 1941

HORWILL, J.

(on difference of opinion between)

WADSWORTH & SOMAYYA, JJ.

EMPEROR*

v.

Boya CHINNA PAPANNA

Evidence Act (1 of 1872) S. 24—Voluntary nature of confession—Proof.

Unless it appears to a court that an inducement, threat or promise was held out by a person in authority, a confession would be relevant under S. 24, Evidence Act without any formal proof by the prosecution of the voluntary nature of the statement. The court considers the suggestions made in cross examination and the statement of the accused and then decides whether there is anything in those suggestions or in the evidence which would lead the court to suspect that the confession was not voluntary.

Trial referred by the Court of Session of the Kurnool Division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 7 of 1941 on 14—3—41 and appeal by the prisoner against the said sentence.

N. T. Raghunathan, for Accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT.

(16–6–1941)

WADSWORTH, J. The appellant has been sentenced to death for the murder of Papanna on the night of 6—11 1940. As the learned sessions judge observes, the case against the appellant depends substantially on his own confessional statements, corroborated by the recovery of incriminating articles as a result of that statement. The main question is whether this statement was rightly admitted and made the basis of his conviction, having regard to the provisions of Ss. 24 and 27 of the Indian Evidence Act.

Papanna was murdered when he was asleep at night and no one saw it being done. The complaint mentioned seven suspects, including the appellant and his co-accused. but this was evidently mere guesswork. The sub inspector arrived on the 7th and on the 8th he secured the evidence of P. W. 7 that on the night of the murder as he was coming home from the fields he had seen the two accused sitting on the sluice of the tank (some distance from the place of the murder) and had spoken to them and that the appellant had an axe, while the 2nd accused had a spear. The witness saw nothing suspicious in their appearance or conduct. Apparently as a result of this information, the sub inspector (who appears to have taken no action on the vague suspicions in the complaint) deputed constables to arrest the two accused. Those constables are not witnesses. On the morning of the 9th, when the sub inspector was at the chavadi with the village munsif and others, the appellant was produced by the constables and was formally arrested and questioned by the sub inspector. In response to these questions he is alleged to have at once confessed that he and the 2nd accused had murdered Papanna and that he had thrown his axe into the tank and had hidden his blood-stained clothes in a pot in his house. He then produced the blood-stained clothes from their hiding place and the axe from the water of the tank. As was to be expected, the weapon bore no certifiable trace of blood, but the clothes were stained with human blood.

On the 9th, the sub inspector also secured the evidence of P. W. 8, who has deposed that on the night of the crime he met the two accused at about midnight, coming away from the fields, armed with an axe and a spear. He said nothing about what he had seen till the police examined him.

The sub inspector in cross-examination denied that he had told either of the accused that he would be taken as an approver, denied that he told the 2nd accused that the appellant had confessed and repudiated a suggestion that the accused were arrested on the 7th along with others and compelled to confess. Before the committing magistrate, the appellant stated that his nose bled and that his clothes thus became stained, but he denied having produced those clothes from his house. He also asserted that he has been detained since the 7th afternoon and had been beaten by the police in order to make him confess, but that he had made

*1941 M.W.N. 929

no statement. The 2nd accused also denied having produced the spear and asserted that he had been beaten. In the Sessions Court the appellant added that P. Ws 7 and 8 were false witnesses and that he never had the axe.

On this evidence it is contended that there is a serious doubt as to the voluntary nature of the appellant's confessional statement, which the prosecution ought to have removed by positive evidence; and that in any case this confession is retracted and is substantially uncorroborated. The argument is that something must have preceded the confession and that the prosecution have not discharged the duty laid upon them of proving that the confession was not induced in an objectionable manner It seems to me that this argument overlooks the nature of the appellant's own statements. He has not alleged that he was induced to confess by violence or promises. His case was that though he was beaten he did not confess at all and did not produce the incriminating articles. It is true that the sub inspector was asked questions which seem to suggest that the confessions were improperly induced, but these suggestions are difficult to reconcile with the appellant's own denial that he made the statements and produced the articles. Two witnesses have corroborated the police evidence that the confessions were voluntary. There is no evidence to support the assertions that the accused were arrested on the 7th, nor does this seem likely. There is no evidence that the accused were beaten. There can be no doubt that the appellant did produce the blood-stained clothes. There is only his own assertion as to the way in which they came to be stained with blood and this explanation is inconsistent with the fact that they were hidden. There is no explanation of the circumstance that he produced the battle axe from the water of the tank. The appellant having contented himself with a complete denial of the incriminating statements and conduct, I do not think that it was incumbent on the prosecution to let in further evidence of the absence of threats, promises or inducements leading to the confession.

In my opinion the appellant has been rightly convicted and sentenced. But as my learned brother has taken a different view of the evidence, the case will have to go before a third Judge.

SOMAYYA, J: I regret that I have felt compelled to differ.

The appellant has been convicted of the offence of murder and sentenced to death by the sessions judge of Kurnool. Two persons were charged and tried for the offence ; the appellant who was the first accused was convicted and the second accused was acquitted.

The appellant is said to have murdered one Papanna of Ulindakonda, Kurnool district on the night of 6th November, 1940 when he was sleeping alone in his field which is about 1½ miles from the village. The deceased went to the field to watch over the harvested korra crop and while asleep, he was undoubtedly killed by some one. The question is "was it the appellant that did so?"

Enmity between the appellant and the deceased was alleged; the judge finds that no enmity has been proved and the learned Public Prosecutor has not challenged this finding before us.

The conviction rests solely on the retracted confession of the appellant which it is said is corroborated by the evidence of two witnesses, P. W. 7 and P.W. 8. and by the discovery of some property as the result of the confesion."

P.W. 3, the son of the deceased, discovered his father dead after midnight and informed his mother, P.W. 4. Then a complaint Ex. B was made to the village munsif at about 2 a.m.; the report of the village munsif was despatched at about 5 a.m., and reached Kurnool taluk police station at 10-30 a.m. The sub inspector reached the village at 2-30 p.m. the same day. He got some information from P. W. 7 on the eighth and deputed his constables to fetch the two accused. On the ninth he examined P. W. 8 and on the same day, the appellant was brought before the sub inspector and when questioned in the presence of P. W. 9 and P. W. 10, the appellant is said to have straightway confessed his crime. The confessional statement Ex. D was written by P. W. 9. The second accused was also brought before the sub inspector on the same day; in fact, the constables had been asked on the eighth to secure the second accused also. When the second accused appeared he was questioned by the sub inspector and he is also said to have at once confessed and given a statement, Ex. E. Ex. D was recorded at 9 a.m. and Ex. E at 12 noon.

Ex. D runs as follows:—"At the instigation of Chingadu, son of Boya Thimmappa,

Hanumanthugadu, son of Boya Chinna Mari Yankata and I cut and killed the deceased Boya Ullam Papanna four days ago now, on the night of Wednesday, while he was sleeping near the korra sheaves in the field. I cut and killed him with the battle-axe while Hanumanthegadu cut and killed him with the spear. I threw away my battle-axe in the waters of the tank (or lake) at the terminal (last) sluice, on my return trip. It is blood stained. The white angi and the white dhoti which I had then worn were stained with blood. I have concealed that dhoti and angi in an empty mud pot, in my house, in which water is boiled. I shall get them and deliver to you." After recording Ex. D a search was made of the appellant's house and the appellant is said to have produced from a pot inside the house a white angi, (a coat) and a white dhoti (cloth); these were said to contain blood marks. Then they proceeded to the tank mentioned in Ex. D; the appellant is said to have produced the battle axe from underneath the water. This was at 11 a.m. (D-2). After the searches and recovery of the articles evidenced by Ex. D-1 and Ex. D-2 the party returned to the chavadi and all of them remained there till 12 noon when the second accused was produced. When questioned he gave the statement Ex. E which runs as follows: "At the instigation of Boya Obigadu, Boya Chinna Papigadu and I, together, cut and killed four days ago now, on the night of Wednesday. I cut and killed with my screwspear and Chinna Papigadu cut and killed with a battle-axe. (I have concealed my spear amidst (fodder) rubbish in the manger, inside my house. It is blood stained. I shall produce it). Chinna Papigadu threw away his battle axe that night, on our return trip in the waters, of the pond (tank or lake)." After recording Ex. E, a search was made for the spear, the second accused produced a spear from his house and Ex E-1 was recorded at 1 p.m. evidencing this search. Then both the first and second accused were charged with the offence of murdering Papanna. Before the committing court, both the accused retracted their confessions. The appellant said that he had no motive to kill the deceased, that the police beat him severely and asked him to confess. He denied that the axe was his. As regards the blood-stained clothes, he said that owing to excessive heat, his nose had bled and the cloths had become blood-stained in consequence. At the trial in the sessions court, the accused adhered to the statements which they gave in the committing court. The judge acquitted the second accused on the ground that the admissible portion of Ex E did not amount to a confession. As regards the appellant he held that the confession contained in Ex. D was voluntary and that though it is a retracted confession, it is corroborated by the recovery of M.Os. 9, 10 and 11 and by the evidence of P. Ws. 7 and 8. The appellant's explanation for blood stains on M.Os. 9 and 10 was rejected on the ground that it was inconsistant with Ex. D. The judge then referred to the evidence of P.W. 7 and P.W. 8 that the appellant was seen in the vicinity of the field where the deceased met his death on the night of the sixth and that the first accused had been armed with a battle axe On this evidence he convicted the appellant of the offence of murder of Papanna and sentenced him to death.

It is urged in appeal that it is unsafe to convict a person on the basis of a retracted confession, that in this case there was no motive proved for the appellant to kill the deceased, that P. W. 7 himself stated that there was nothing unusual in villagers going about with a battle-axe when going in nights to watch their fields, that even if his evidence is accepted as true, there is nothing suspicious about the appellant's conduct on the previous night, that the evidence of P. W. 7 and P. W. 8 should not be accepted on the ground that their statements were available only on the eighth and ninth i.e. two and three days after the occurrence. It is also urged that there are enough indications in the evidence to show that the confession was not voluntary.

Taking the evidence of P.W. 7 and P.W. 8 first, the evidence of P. W. 8 was available only on the ninth i.e. on the day of the confession. Three days had elapsed and it is unsafe to rely upon the evidence which is given so late. The same remarks apply to P. W. 7 whose statement was available only on the 8th. Two days had elapsed. Neither of them had stated to any one what they had seen on the night of the sixth even though they knew that the deceased was murdered on the night of the sixth. Their conduct is inconsistent with their having seen the appellant armed with a battle-axe on the night of the sixth anywhere near the scene of occurrence. I think

it is unsafe to accept the evidence of P.W. 7 or P. W. 8.

Before I go to Ex. D, we must see what happened on the seventh and eighth. P. W. 11, the sub inspector of police, Kurnool taluk station came to the village on the seventh at about 2—30 p.m. In Ex. B, the wife of the deceased gave the names of seven persons as suspects. Among these are accused 1 and 2. After P. W. 11 arrived in the village, he did not take any steps to verify if these men were in the village nor even to visit the house of any of the seven persons mentioned in Ex. B. The village munsif who was examined as P. W. 9 was asked about it and he said, "Till the arrival of the sub inspector I did not take any steps to verify if these seven men were in the village. The sub inspector was in the village on the seventh and 8th. Neither he nor I visited the houses of any of the seven men named in Ex. B on the 7th or 8th," The Public Prosecutor conceded that as the sub inspector was not asked in chief examination to deny what the village munsif stated, we must take it that the statement of the village munsif is true. It is said by the learned Public Prosecutor that merely on the ground that the names of these persons were given as suspects in Ex. B, their houses could not be searched. True. But that is no explanation why, as the village munsif says, steps were not taken to see whether these people were even in the village or why their houses were not even visited. According to the prosecution, what put the sub inspector of police ultimately on to the accused 1 and 2 is the statement given by P. W. 7 on the 8th. P. W. 7 stated that he saw accused 1 and 2 on the night of the sixth, the first accused with a battle-axe and the second with a spear. It is this information that evidently led the sub inspector of police to take action against these accused and to depute two constables to fetch them. It is strange that with the information given by P. W. 7 the sub inspector did not think it worthwhile to search the houses of the first or second accused but contended himself with merely deputing two constables to fetch them. He says:—"Till I deputed the constables on the 8th to arrest accused 1 and 2, I did not take any steps to apprehend any of the seven persons mentioned in Ex. B or to search their houses. I did not attempt to search the houses of accused 1 and 2 even after deputing constables on the 8th to get them. I had no reason to believe that accused 1 and 2 would confess. I thought I had no sufficient grounds to search their houses though I had decided to arrest them." This is a curious answer. If he had sufficient grounds to arrest them, it is difficult to understand his statement that he had not sufficient grounds to search their houses. The way in which the accused are said to have confessed the moment they appeared before the sub inspector and what went before lead me to suspect that everything was known to the police and that the whole thing was merely a farce of having a confession first and a search immediately thereafter to bring the case within S. 27 of Evidence Act. The appellant is first produced at 9 A. M. Immediately he makes a confession, Ex. D. Then the first search is made and that is recorded at 10 o'clock. At 11 o'clock the second search was made which led to the recovery of the battle-axe. At 12 noon, the second accused is produced and he confesses immediately. Then the search of his house is made and the search report was prepared at 1 P. M. to show the recovery of the spear in consequence of information contained in Ex. E. If the prosecution evidence is true, I cannot understand why even after Ex. D. in which the second accused was very clearly implicated, his house was not searched. The searches in connection with Ex. D were finished at 11 A.M. Then as P.W. 10 states in cross exmination, the party returned and were simply sitting until 12 noon when the second accused was brought. P.W. 10 says, " When we returned from the tank to the chavadi we did not expect the second accused to be produced. Still we stayed on there although we had nothing specific to wait for."

There is another point take n by the appellant. It is said that the confession itself is not admissible under S. 24 of the Evidence Act. That section runs thus:

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."

The rule in England as stated in Taylor on Evidence is this, 872 (12th Edition).

"Before any confession can be received in evidence in a criminal case it must be shown to have been

voluntarily made . . . The rule which excludes confessions not shown to have been made voluntrily is a rule of policy. It is not that the law presumes such statements to be untrue, but that owing to the danger of receiving such evidence, judges have thought it better to reject it."

In *Ibrahim* v. *R* (*1*) the Judicial Committee observed:

"It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority;"

In India, however, the matter is put more elaborately in s. 24. One question that arises under s. 24 is whether it is really on the prosecution to prove that the circumstances mentioned in s. 24 do not exist or whether it is upon the accused to prove that the making of the confession was caused by inducement, threat or promise. It is no doubt true that the burden of proving facts which are specially within the knowledge of a person may be thrown upon him but having regard to the well-known principle of criminal jurisprudence recognised in *Ibrahim* v. *R* (1), I have no reason to doubt that what the Indian legislature attempted to enact more elaborately in s. 24 of the Evidence Act is that a court must be satisfied before admitting a confession that it is free from all taint. The wording of s. 24 is *if it appears to the court* to have been caused by inducement, threat etc., a confession is irrelevant, It is not 'if it is proved to have been caused by' inducement, threat or promise. As pointed out in *Emperor* v. *Panchkouri Dutt* (2), the Indian legislature has deliberately used the expressioon "if the making of the confession appears to the Court' and not 'if it is proved to the satisfaction of the court.' Therefore if the court has any reason to doubt the free and voluntary nature of the confession, then it is for the prosecution to prove that it was made without any of the inducements, threats or promises mentioned in this section. It is not as if there is less need for protection to an accused person in India than in England. Yet in England, the burden lies undoubtedly on the prosecution to prove that the confession was voluntary before it is admitted. I have no reason to think that the standard is less strict in India. As I said before, the legislature seems to have endeavoured to enact the same rule in a more elaborate manner.

It is said that in this case the appellant set up the story that he was beaten by the police and that if it was true, there would have been some marks of violence on the person of the accused. As regards the argument that the accused has not proved that he was beaten, it is as in most of such cases impossible to expect him to be able to prove to the satisfaction of the Court that he was belaboured or that there are any of the infirmative circumstances mentioned in S. 24. Then it is said that what was suggested to the sub inspector during the cross-examination was that some inducements were held out to the appellant in order to induce him to confess and not that he was beaten. P. W. 11 was asked whether he did not tell either of the accused that he would be taken as an approver if he confessed and he was also asked whether it was not true that accused 1 and 2 were arrested even before the ninth and compelled to make a confessional statement. There is enough suggestion in this second sentence that they were compelled and what is mentioned in the accused's statement is only an elaboration of what is taken down as compelled in the cross-examination of P.W. 11. There is nothing in the evidence of P.W. 10 to advance the case of the prosecution. There are enough materials in this case to raise a very serious doubt in my mind about the free and voluntary nature of Ex. D. I apply therefore the rule enunciated in *Emperor* v. *Panchkouri Dutt* (2) and hold that it was the duty of the prosecution to have satisfied the Court that none of the circumstances mentioned in S. 24 exist in this case and the evidence falls far short of it. On the other hand, all the circumstances point to the conclusion that very much more should have happened than what is admitted by the prosecution.

Lastly there is the fact that the accused retracted the confession and the question is whether it is safe to convict him on the strength of the retracted confession. Necessity of corroboration in a case of this kind, is recognised by all the authorities and was not seriously questioned by the Public Prosecutor. It is said that in this case the corroboration is to be found in the evidence of P.W. 7 and P.W. 8 and in the discovery of M.Os. 9, 10 and 11. It is unnecessary to go into this question fully in the view that I have taken on the other points. But there seems to be some force in the appellant's contention that what was

1. (1914) A.C. 599 (609)
2. (1925) 52 Cal. 67 (82)

discovered by reason of the information given in Ex D ought not to be treated as corroboration of the statement made in Ex. D and that even if as P.W. 7 and P.W 8 say, the first accused was carrying a battle-axe which it was very common for every villager to do, then there is nothing suspicious in that act and that again would not be a corroboration of Ex. D.

I would reverse the conviction and sentence and direct the appellant to be set at liberty.

Before leaving this case, I should say that the question whether S. 27 of the Evidence Act has been altogether abrogated by S. 162, Cr.P.C. ought to be set at rest by the Central Legislature without leaving the matter in a state of confusion. It is enough to point out that the Lahore High Court by a majority held that it was repealed and the local legislature interfered in the matter, The Allahabad High Court has also held that S 162 abrogates s. 27 of the Evidence Act. I am very strongly in favour of this view. Two decisions of the Madras High Court have been brought to my notice in which it has been held that s. 27 still stands in spite of s. 162, Cr. P. C. and this view has been taken by the Nagpur and Patna High Courts. It is obviously very unsatisfactory to leave the matter in this state. Advantage might be taken of this opportunity to examine the whole law of confessions and amend s. 24 so as to make it clear that before a confession is allowed to go in, the prosecution must prove that it is voluntary.

K. S. Jayaram, for accused.

Public Prosecutor (*V. L. Ethiraj*,) for Crown.

JUDGMENT.

HORWILL, J.:—The appellant was convicted of an offence punishable under s. 302, I. P. C. by the Sessions Judge of Kurnool and sentenced to death. On a difference of opinion between Wadsworth and Somayya, JJ. the appeal has been posted before me.

The facts of the case have been stated in the judgments of my learned brothers and the main question that I have been asked by the learned advocate for the appellant to consider is whether the confession made by the appellant was made voluntarily. On this point Wadsworth, J. held that it was and Somayya J. that it was not.

The wife of the deceased person had no information as to who had committed the murder, but because of past enmity she suspected seven persons, and amongst them were the two persons who were accused in the lower court. No definite material was forthcoming for a day and a half or so that was sufficient to warrant the arrest of either of them; but on the 8th of November the offence having taken place on the night of the 6th P. W. 7 told the sub inspector that he had seen the two accused together on the night of offence, the appellant armed with a battle-axe and the other accused with a spear. As the deceased man seemed to have had his head battered in with blows from an axe and to have been stabbed with a spear, the sub inspector sent two constables on the night of the 7th to arrest the accused; and they were brought to the sub inspector the following morning. He then had with him the village Magistrate and the President of the Panchayat Board to assist him in his investigation. The Sub Inspector immediately questioned the appellant, who told him that he and the other accused had committed this offence and that he had thrown the axe with which the offence was committed into a certain tank and that the bloodstained clothes which he was wearing on the night of the offence had been placed in a pot inside his house. The learned advocate for the appellant contends that it was not sufficient for the prosecution to let in evidence of the questions put and the answers of the appellant; but that they were bound to show by all evidence possible that the confession was made in circumstances from which it could be conclusively deduced that the statement was voluntary. Particular reliance has been placed on a decision of the Privy Council reported in *Ibrahim* v. *R*. (1) in which it has been said:

"It has been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority."

Our own Evidence Act does not put the matter in the same way. S. 21 makes admissions relevant and says that they may be proved as against the person who makes them. S. 24 deals with an admission which amounts to a confession and adds a proviso to the ordinary rule that an admission can be proved against the person who makes it by laying down that:

"A confession made by an accused person is irrelevant if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient . . . to give the accused

person grounds . . . for supposing that by making he would gain any advantage or avoid any evil of a temporal nature . . ."

This wording suggests that unless it appears to a Court that an inducement, threat, or promise was held out by a person in authority a confession would be relevant under S. 21 of the Indian Evidence Act without any formal proof of the voluntary nature of the statement.

It has certainly not been the practice of the courts of this Presidency to require from the prosecution formal evidence that the statement was voluntary. There is always cross examination on this point and the accused is always questioned by the Court about his confession. It is customary for the Court to consider, the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the evidence which would lead it to suspect that the confession was not voluntary. However, this discussion whether formal proof by the prosecution of the voluntary nature of the confession is necessary is an academic one; because P. W. 9 has set out the circumstances under which the accused was questioned; he says that "a policeman brought accused 1 to the sub inspector about 9 a. m. We had gathered there casually . . . . After arresting the 1st accused, the sub inspector asked him "What do you know of the death of Vullam Papanna." The accused's confession seems to have been an answer to that question This is very much what happened in the Privy Council case above referred to *Ibrahim* v. *R* (1), where the officer who was the superior of the soldier charged, said to him "why have you done such a senseless act" to which the accused replied, "Some three or four days he has been abusing me. Without a doubt I killed him."

That statement was held to be a voluntary one; and I see no reason for holding that the statement in the present case was not made voluntarily. It is probably true that the sub inspector preferred obtaining information from the accused rather than by searching his house; but that does not in any way cast any doubt on the voluntary nature of the confession made.

It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. I do not believe this to be the case. A man who has committed a grave crime—unless he is a hardened offender—has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction fear of them will act in restraint of his natural impulse to confess. At the moment of his arrest, the ordinary accused feels that the game is up and that it is futile to attempt to try to conceal his guilt any longer. Even in cases in which no confession of the accused is tendered in evidence, because it does not lead to any discovery a perusal of the records frequently shows that some sort of a confessional statement is made. There is nothing in the evidence in this case which suggests that the appellant was detained and questioned for a considerable time before he made his statement. The evidence is in fact to the contrary.

That voluntary confessions made to a police officer are admissible if they satisfy the conditions laid down in s. 27 of the Evidence Act—despite the provisions of s. 162 Cr.P.C.—has been held consistently by this Court over a long course of years. If the statement made by the appellant was voluntary—as I hold it was—there can be little doubt of the truth of his confession. As a result of it the axe was found in a tank, and it is unlikely that it would have been found had it not been for the confession. Further, certain clothes stained with human blood were found in the house of the appellant, which he said in his confession were worn by him at the time of the murder. The evidence of P. Ws. 7 and 8 is also corroborative of the confessional statement; for they saw the two accused persons on the night of offence not far from the scene of offence, armed with instruments similar to those with which the appellant says they committed the murder. The medical evidence shows that such weapons could have caused all the injuries found on the body of the deceased.

P. Ws. 7 and 8 are unconnected either with the appellant or with the deceased; and it is difficult to believe that they would be willing to say that they saw the accused armed with an axe and a spear respectivly near the scene of offence on the night when the offence was committed unless they had actually seen them. If it were customary for witnesses to come forward at the very first opportunity and tell the

police that they had seen something connected with the murder, then the value of the evidence of P. Ws. 7 and 8 would be seriously diminished by their failure to inform the police at the earliest opportunity. P. W. 7 waited a day or so before he told the sub inspector what he knew and then probably spoke only because he was questioned, whilst P W. 8 probably did not come forward with information until after the appellant had made his confession. Unfortunately, witnesses are almost always unwilling to speak and thereby risk the enmity of the accused and his friends and put themselves to great inconvenience unless they are personally interested. There is nothing improbable in this evidence of these witnesses. They are absolutely disinterested and so there is no reason why their evidence should not be accepted.

I therefore agree with Wadsworth, J. that the appellant was properly convicted of the offence with which he was charged.

A strong plea has been made for the modification of the sentence; but I do not find any circumstances that extenuate the crime of the appellant. The murder was apparently a deliberate one, committed in cold blood while the deceased was lying in his field. The side of his head was crushed by repeated blows with a weapon such as the axe used by the appellant, which shows that these blows must have been delivered while the deceased was lying on the ground. The conviction and sentence are therefore confirmed and the appeal dismissed.

N.T.R. — *Appeal dismissed.*

FULL BENCH

R. C. No. 20 of 1941

September 8, 1941.

SIR LIONEL LEACH, C. J., GENTLE & SOMAYYA, JJ.

In the matter of Sri V.M. SUNDARESA AYYAR, Pleader, Vellore*

Legal Practitioner—Filing false fee certificate—Misconduct.

It is professional misconduct for an advocate to file a fee certificate without having received the fee.

Advocate General (*Sir A. Krishnaswami Ayyar*), in support of the notice.

T. M. Krishnaswami Ayyar & *V. Govindarajachari*, for respt.

JUDGMENT

(SIR LIONEL LEACH, C. J.)

Tne respondent is a pleader practising at Vellore. He has been charged with professional misconduct. He filed in court three certificates to the effect that he had received from his client by way of fees Rs 40, Rs. 60 and Rs. 20 respectively. He had not in fact received these fees and his certificates were false. The charge against him is in connection with the filing of these certificates.

There is no dispute with regard to the facts, but the respondent pleads that there are extenuating circumstances. He had acted for this client for many years and he had kept a running account in respect of the work done for him. He had always been paid his fees and he had no reason to suppose that these sums would not be paid. It is certainly a very serious matter for a pleader or an advocate to file a false certifiicate with regard to fees. This Court had to draw attention to the seriousness of such conduct in a circular issued on the 13th April 1939. In that circular the court said that for a pleader or an advocate to file a fee certificate without having received the fee was most improper and the court would take strong disciplinary action in any case coming to its notice. This appears to be the first case which has been brought to the notice of the court. It will be inadequate to pass a mere censure on the respondent as his offence is a very serious one but as there is something to be said for him in extenuation we consider that adequate punishment will be to suspend him from practice for a period of one month, and there will be an order accordingly.

It must be clearly understood that the punishment which the court has inflicted in this case is not to be taken as a guide with regard to the court's action in the future. What is stated in the circular will be adhered to.

N.T.R. —

*1941 M.W.N. 936

R. T. No. 32 of 1941
Cr. Apps. Nos. 147, 146, 151 & 114 of 1941
April 8, 1941
BURN & MOCKETT, JJ.
EMPEROR
v.
MARUTHIAH THEVAR & another.*

Penal Code (*XLV of* 1860), *S.* 302—*Two men attacking with dangerous weapons—Fatal and non fatal wounds—Guilt.*

If two men armed with dangerous weapons attack another with a view to kill him and both of them wounded him and he is found to have received a fatal wound and another wound which is not fatal, either or both the assassins cannot be allowed to escape merely because the non fatal wound might have been inflicted by either of them.

Trial referred by the court of session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said prisoners in C.C. No. 1 9 of 1940 on 10th February, 1941, and appeals by the prisoners against the said sentences and appeals by the said prisoners (accused 2, 5 in C.A. No. 151 of 1941 and Accused No. 4 in C.A. No. 114 of 1941) against the sentences of 2½ years R.I. passed upon them in the said case under S. 332 I.P.C. on charges 3 and 4 respectively.

V. T. Rangaswami Ayyangar, K. Ramaswami Apyangar & K. Kalyanasnndaram, for accused.
Public Prosecutor (*V. L. Ethiraj*), for Crown.

JUDGMENT.

(BURN, J.)

These appellant were tried together by the learned sessions judge of Tinnevelly for offences committed on the night of the 22nd February, 1940. The case is a striking illustration of the risks that are daily run by police officers in the discharge of their duty of trying to protect the public. On the 22nd February, 1940 the sub inspector of police (P.W. 8) and Head Constable 444 were informed by P.W. 7 that the 1st accused, Maruthiah Thevar, had tried to stab him. This information was given at about 8-30 p.m. at the police station at Sankarankoil. Now the 1st accused is a registered member of a criminal tribe and his presence in Sankarankoil at that time of night appeared to the sub inspector to indicate that he must have left his village of Irumangalam without a pass. The sub inspector therefore arranged with the head Constable to go that night and check the members of the Criminal tribe At about 9-30 p.m. the sub inspector and the head constable started out on their cycles. They had not gone more than three quarters of a mile from Sankarankoil when, according to the story told by the sub inspector afterwards, they came across the five accused molesting two Adi Dravidas on the road (P.Ws. 9 and 10). The police officers interfered asking the accused what they meant by it and the 1st accused, it is said, immediately attacked the sub inspector. The 1st and 3rd accused, the Sub Inspector says, were armed with aruvals and the other three with spear sticks. The Sub Inspector caught hold of the hand of the 1st accused in which he held the aruval and the Head Constable went round behind the 1st accused and caught him from behind. The other four accused began to run away but the 1st accused cried out upon them for deserting him in that emergency and thereupon they turned back to help him. The 2nd accused, the Sub Inspector says, hit him (Sub Inspector) with his spear stick. The 2nd, 4th and 5th accused set upon the Sub Inspector and Head Constable and beat them. The Sub Inspector fell down and the 3rd accused, he says, cut him on the right leg striking with such force as to cut through the putti which he was wearing. The 1st accused, the Sub Inspector says, cut the Head Constable on the head with his aruval and the 3rd accused afterwards cut the Head Constable on the legs and after that all the accused are said to have run away.

Head Constable 444 was fatally injured and in the opinion of the doctor he must have died practically instantaneously. His skull was fractured and the brain matter was damaged. The doctor says that the cut on his leg was sufficient in the ordinary course of nature to cause death. There were many other injuries on the Head Constable The Sub Inspector survived though he too was severely injured. He had 12 wounds on his person altogether of which the most serious was the cut on the leg which had gone through the putti. The Sub Inspector however was able to get on his bicycle and he went a distance of about 60 yards to a rice mill. There he found two Chettis (P. Ws. 11 and 12) who are employed in the mill and he begged them, one to give him water and the other to go running to Sankarankoil and tell the Inspector. P. Ws 11 and 12 however were so terrified when they heard of the outrage committed by Irumangalam Thevars that they took refuge in the mill and did not come out again. The Sub Inspector was able with great effort to mount his bicycle again and he made his

*1941 M.W.N. 953

way back to Sankarankoil to the front of the taluk office and there he fell off into the road. The Circle Inspector (P.W. 16) was informed by a constable and came to the spot as soon as he could He was told by the Sub Inspector that he and Head Constable 444 had been attacked and cut by criminal tribe members from Irumangalam and that the Head Constable was still lying on the road. The Inspector went to the place and found the Head Constable who was dead before that time although the Inspector was not quite sure that he was dead since he was in a sitting posture and looked as though he might be just alive.

These are the facts upon which the learned Sessions Judge has convicted the 1st and 3rd accused for the murder of Head Constable 444 and has sentenced them to death. He has also convicted the 1st accused of attempting to murder the Sub Inspector (S. 307 I. P. C.). The other accused have been convicted of two offences under S. 332, I.P.C. on the ground that they voluntarily caused hurt to deter the public servants namely the Head Constable and the Sub Inspector from their duty. For each of these offences accused 2, 4 and 5 have been sentenced to R. I. for 2½ years, the sentences running consecutively.

The Sub Inspector (P.W. 8) is, from the nature of the case, the only eye witness and the only question that really calls for consideration is whether the accused have been satisfactorily identified as the persons who attacked him and the Head Constable on the night of the 22nd February 1940, The Sub Inspector knew the 1st accused before. He had known him for at least 10 years. He mentioned the name of the 1st accused to the Chettis at the rice mill and to the Inspector of Police as soon as he reached Sankarankoil. The night was a moonlight night and cross examination of the Sub Inspector did not elicit any reasons why he should not be supposed to have been able to see who his assailants were. The place is on the road and there are tamarind trees about, but it was not shown that the tamarind trees cast such a heavy shade that the Sub Inspector could not recognise his assailants So far as the 1st accused is concerned, there is no difficulty and no reason to suppose that the Sub Inspector made any mistake about him. The relations between the Sub Inspector and the 1st accused had previously been friendly and there was no reason for the Sub Inspector to make false allegations against him. The evidence of the Sub Inspector alone is sufficient to warrant the conviction of the 1st accused.

The other four were not known to the Sub Inspector beforehand but there was evidence adduced on the side of the prosecution to show that they were the men who were concerned in the offences. The Sub Inspector himself identified the 3rd, 4th and 5th accused at parades held by Magistrates. These identification parades did not take place until some considerable time later because all the accused absconded immediately after the 22nd February. The 1st accused surrendered on the 3rd May; the 2nd accused was arrested on the 5th May; the 3rd accused on the 8th May; the 4th accused did not surrender until the 26th July and the 5th accused was arrested on the 9th May. Now the Sub Inspector picked out the 3rd and 5th accused at a parade held on the 20th May and the 4th accused at a parade held on the 1st August. Learned counsel for the accused had pointed out the delay between the date on which these accused were arrested or surrendered and the identification parades and he has suggested that the Sub Inspector had opportunities of seeing them before he pointed them out at the parades. The Sub Inspector however was not cross-examined on this subject in any effective manner. It was shown that the Sub Jail and the police station were close together, and the Sub Magistrate (P.W. 2) says that the police officers in the station could have seen the prisoners in the sub jail if they wanted to. But the Sub Inspector in cross-examination said that when he went to Sankarankoil on the 20th May he did not go to the Police station but to the Sub Magistrate's court and he says it is not true to say that he had a chance of seeing the persons to be identified before the formal parade was held. Apparently the Sub Inspector was not at that time employed at Sankarankoil Station. He had been severely injured on the 22nd February and had spent considerable time in hospital and at the end of May he was employed elsewhere. The parade on the 1st August was held at Kokkarkulam in the presence of the Sub Magistrate of Palamcottah (P. W 3) There is no reason to disbelieve the Sub Inspector when he says that he was not shown the prisoners before the parades were held.

But, in so far as the 2nd, 3rd, 4th and 5th accused are concerned the Sub Inspector's evidence does not stand alone. All the five accused were seen together by P.W. 7 in Sankarankoil at 8-30 p. m. as already mentioned. All the five accused were spoken to by P. Ws. 9 and 10 the two Adi Dravidas whom they were alleged to have obstructed on the road when the Sub Inspector and Head Constable came up. P. W. 10 is a resident of Vadakkupudur where the 2nd accused lives. P. W. 9 lives at Achampatti. Both these witnesses knew all the accused before. All the five accused were also seen on the road, near the rice mill by P. W. 11. The evidence of P. Ws. 9 and 10 has been attacked on the ground that they did not make any statement to the police until a week after the occurrence. They have never attempted to conceal the fact that they did not make a statement for a week after the occurrence. On the other hand it is only too clear that both of them were terrified, made themselves scarce and hoped that they would not be involved in any further trouble on account of what had happened on the night of the 22nd Eebruary. P. W. 9 actually ran away from home to Kathanur and P. W. 10 kept quiet. The police were obliged to get the tahsildar to advertise by proclamation for these witnesses or for anybody else who could give information about them. Their evidence is not to be discredited merely because it was forthcoming only a week after the occurrence.

The evidence of these witnesses taken together leaves, we think, no reasonable doubt about the identification of all the accused. As for the actual parts played by them in the occurrence the evidence of the Sub Inspector has to be accepted. The Sub Inspector was a new comer to the police station at Sankarankoil. As the learned sessions judge has pointed out he had had no time to acquire prejudices for or against the people in the jurisdiction of his station. He was friendly with the 1st accused, the 3rd accused is a brother of the st accused and the 4th accused is the father of both the 3rd and the 1st and it is not reasonable to suppose that he wished to bring a false case against them. As for the 2nd and 5th accused there is no suggestion of any reason why the Sub Inspector should have accused them falsely. The assessors unanimously expressed the opinion that all the accused were guilty of the offences with which they have been charged and the learned sessions judge was undoubtedly right in agreeing with the assessors.

Leaaned counsel has suggested that, even if the evidence be accepted, the 3rd accused ought not to be convicted of murder. The Sub Inspector said that the 3rd accused had cut the Head Constable on the thigh. As a matter of fact the doctor found two wounds on the thighs of the Head Constable, one on the right leg and the other on the left. The wound on the left thigh was fatal but the wound on the right thigh was not. Learned counsel suggests that the wound inflicted on the thigh of the deceased by the 3rd accused may have been the wound which was not the fatel wound and there is nothing to show quite positively that it was the wound on the left leg. As to this we find ourselves in agreement with the learned Public Prosecutor that it is not a matter of any importance. If two men armed with aruvals attack another and both of them wound him and he is afterwards found to have received a fatal wound and another wound which is not fatal it is not possible to allow either or both of the assassins to escape merely because the non-fatal wound might have been inflicted by either of them. Considering the circumstances in which the attack was made upon these two police officers it seems clear that both the accused who attacked them with dangerous weapons namely the 1st and 3rd intended to kill them. The 2nd, 4th and 5th accused have been convicted only under S. 332 I.P.C. apparently because they are not said by the Sub Inspector to have inflicted any wounds with the spear heads. They were all carrying spear sticks but the Sub Inspector says only that they beat him and the Head Constable with the sticks. That no doubt is why the learned sessions judge did not think it right to charge those three accused with complicity in the actual murder. Their conviction for two offences under S. 332 I. P. C. is clearly correct.

The question of sentence is of course one presenting no difficulties whatever. While confirming the conviction of the 1st and 3rd accused for the murder of the Head Constable we confirm also the sentence of death and we confirm the sentence passed upon the 2nd, 4th and 5th accused for the offence under S. 332. All the appeals are accordingly dismissed. The 4th

accused who is on bail must surrender to serve out the unexpired portion of his sentence.

Nothing can compensate the Head Constable who lost his life in the discharge of his duty but we do wish to add a word of appreciation of the courage displayed by both these officers. The Sub Inspector showed great tenacity and determination in the efforts that he made not only to prevent the accused from illtreating P.Ws. 9 and 10 but also to get back to his station and report the occurrence. It is regrettable that he was not at the time armed with a revolver.

N.T.R. *Conviction confirmed.*

R. T. No. 19 of 1941

Cr. App. No. 86 of 1941.

March 11, 1941.

BURN & MOCKETT, JJ.

EMPEROR

v.

ANNIKA LAKSHMUDU & others.

Evidence Act (I of 1872), Ss. 24 & 27—Confession—Admissibility,

Where the accused was questioned by the sub inspector in the following manner 'Did you commit the offence? Produce the sticks and knives used by you. You need not be afraid if you do so,' and the accused said 'We admit the offence' and the sub inspector took them to the house of the 1st accused and there the accused made statements, A-1 producing a knife and A-2, 3, 4 and 5 sticks.

Held, *these statements which are of a confessional nature are inadmissible under S. 24, Evidence Act. These statements were made in answer to a direct inducement, viz., that a promise that nothing would happen to them if they produced the sticks and knives which were used and that request was preceded by the words 'Did you commit the offence?'*

On these facts the sessions judge observed that such inducement will not take away from the essential truth of the statements made by them and their production of the weapons used by them.

Held, *the statements were not receivable in evidence at all and their truth cannot be the subject of enquiry.*

Held *further, that the statements whilst producing the material objects concerned are not statements in consequence of which a fact was discovered and hence not admissible.*

Trial referred by the court of session of the East Godavari division for confirmation of the sentences of death passed on 24—1—1941 upon the said prisoners in C.C. No. 2 of 1941 and appeal by the said prisoners against the said sentences of death passed upon them in the said case.

E. T. Chokkammal, for Accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

(MOCKETT, J.)

The five appellants have been convicted and sentenced to death by the learned sessions judge of East Godavari for the murder on the 25th September 1940 of Chinki Asahayudu. The deceased and the accused lived in the village of Siddavaripalem which is shown on the plan and all that it is necessary to note on the plan is that, as is in evidence, any one who wishes to visit the shandy which is used by the people of this village must pass through a forest and later through a village called Erakapuram to reach that shandy and consequently on returning from the shandy they will take the same way in the opposite direction.

There is a history of the parties in this case which may be shortly noticed although it is of no very great importance. The deceased was the husband of P.W. 4 who had been married when she was young but had not joined her husband. Then P. W. 4 lived with P. W. 7 and married him but remained with him only for a year. She then left him and went to live with the deceased. P. W. 7 married again one Chinnammi who bore him two children and then this Chinnammi joined Asahayudu. Naturally this action of the deceased in attracting two women from the house of P. W. 7 into his own caused trouble in the village and a panchayat was held and Asahayudu was directed to pay Rs. 116 to the caste elders for distribution to the aggrieved parties. The amount was reduced to Rs. 40 of which P. W. 7 received Rs. 20 and the rest of his castemen the other Rs. 20 between them. We mention this narrative because it is suggested in this case that the relations of Annika Nukayya were much aggrieved because of

*1941 M.W.N. 956

the action of the deceased who had taken two women from P. W. 7 and it was thought the particular caste was thrown into disrepute. That is alleged to be the reason why Asahayudu was murdered by accused 1 to 5. Naturally to attach any great importance to this circumstance would be to attach importance to matters which must be purely conjectural. But they do at any rate make intelligible what did happen on that evening as was found by the trial court. P. W. 4 was returning from the shandy to the village of Siddavaripalem and she had reached a tadi tree marked on the plan which is in a jungle. P. W. 4 was walking in front carrying the shandy purchase and the deceased was walking behind. She heard a rustling sound and turning round states that she saw the following scene which we reproduce in her own words: "I saw accused 1, Annika Lakshmudu, cutting Asahayudu on the leg. Accused 1 next cut Asahayudu on the left side of the forehead. The other four accused belaboured and thrashed Asahayudu with sticks. The knife used by accused 1, Lakshmudu, was like M. O. 1. The sticks held and used by accused 2, 3, 4 and 5 were like M. Os. 2, 4, 6 and 7. I bowed and clasped hands crying, 'Babu, Babu,' and then accused 3, Tenke Bennayya hit me on the right thumb and accused 2, Masara Venkanna, hit me on the left shoulder." That is her statement and description of what happened.

It is convenient now to pause for a moment and see what were the wounds found upon this man. The doctor Venkataraman, P. W. 3, held the postmortem examination on the 29th September, He said he found five injuries on the body; (1) a cut exposing the skull bone 2½ in by ¾ in. (2) a simple fracture of the middle third of the left upper arm: (3) a compound fracture of upper third of right upper arm; (4) a simple comminuted fracture of lower third of left radius and a simple fracture of lower end of the shaft of left ulna bone; and (5) a compound comminuted fracture of lower third of left tibia with the lower end of the upper fragment protuding through a wound. There was also a fracture of the middle third of the shaft of left fibula. On an examination of the head he found a cross shaped fracture on the left side of the frontal bone and on opening the skull bone he found that the left three-fourths of the horizontal fracture and the lower three-fourths of the vertical fracture were visible inside also. He states that injuries 2, 3, 4 and 5 could have been caused by a blunt instrument like a stick and No 1 could have been caused by a sharp instrumet like M.O. 1. He thinks that the sticks could have caused the fractures. So, it will be seen that the injuries found upon the deceased correspond with the account of the attack upon him as described by P. W. 4. She herself had two injuries on her which are described by the doctor as follows: (1) a swelling on the other part of dorsum of right hand with swelling of the upper part of the thumb, and (2) a contused swelling on the lower portion of front of left shoulder. So it will also be seen that both as regards the injuries which she describes she saw inflicted on the deceased and the injuries that she states she herself actually received she is corroborated by the medical testimony.

It is natually of great importance in a case of this sort to examine the subsequent conduct of the principal witness who is P. W. 4. She was described by the learned sessions judge quite rightly as "a frightened ambushed woman". She threw down her basket and ran away home and she sent word through one Kesavayya who has been described as a boy. He called her son-in-law, P. W. 5, and when he came, which he did according to P. Ws. 4 and 5, she told him what had happened and in much the same words as have been set out above. P. W. 5, according to her, went to the spot and what happened there will be described when dealing with his evidence. Now the village of Siddavaripalem is a lonely place and the inhabitants do not venture out at night for fear of wild animals and so no message was sent to the authorities until the next day The next day P. W. 5 went to the village munsif at a village called Peda Mallapuram and he came to Siddavaripalem about noon. He examined P. W. 4 and she made a statement to him which is marked Ex. F in this case. An examination of that statement shows that she described consistently with her evidence in the court the incidents of the night before. She assigns to the various accused the weapons and the use of the particular weapons in each case. P. W. 5, the son-in-law, tells how he was summoned by being told that he was urgently required and he went home and then P. W. 4 told him again in similar terms

to those which we have already set out how her husband had been attacked by these five accused and with those weapons and in that manner. But he adds that P. W. 4 asked him, 'Go and fetch the deceased home'. This he did. He states that the deceased said to him,

> "Annika Lakshmayya cut me with a knife. Mosara Venkanna, Tenke Bennayya, Tenke Butchayya, Annika Injappa, beat me with sticks. I do not hope to survive."

There has been some criticism of this witness with regard to whether he can be believed when he says this statement was made for reasons which we will deal with presently. P. W. 5 proceeded to the village of Peda Mallapuram and he made a report to the village munsif. The village munsif came back to Siddavaripalem and at the village he recorded from P. W. 5 Ex. G. Ex G gives an account which is similar to that which has already been given by P. W. 4, but the statement which P. W. 5 made to the munsif does not mention that the deceased made the dying declaration which we have set out. It does however say that the deceased said "He (the deceased) asked me to take him home," and that with the assistance of villagers he was brought home. It is not suggested that any other statement was made by the deceased who died soon after. At this point we may deal with the criticism which Miss Chockammal levelled at Ex. G, namely, the omission to refer to the dying declaration. There is this to be said about it. It is quite clear from Ex. G that P. W. 5 told the village munsif that the deceased was able to speak because he said "He asked me to take him home." That being so the probabilities that he also told him what had happened are great. Of course it may be said that knowing already from P. W. 4 what had happened he may have at the trial thought fit to add it to his evidence but we do not consider that the omission from Ex. G. of the statement seriously affects the credibility of P. W. 5 as a whole.

The accused were arrested on the 29th of September and P. W. 10, the village munsif, describes what happened. This witness describes how he was summoned to Siddavaripalam and saw the dead man and he also describes how he took the statement Ex. G from P. W. 5 and Ex. F from P. W. 4. He seems to have sent this report promptly and in this case there has been no cross-examination to suggest that there was any manipulation or preparation of the evidence at Siddavaripalam. When the police arrested the accused the munsif states that the following occurred: "Accused 1 Lakshmudu first was questioned by the Sub-Inspector in these words, 'Did you commit the offence? Produce the sticks and knives used by you. You need not be afraid if you do so.' All the five said, 'We admit the offence." Thereupon the Sub-Inspector took them to the house of the first accused and they made statements, A-1 producing a knife and A-2, A-3, A-4 and A-5 sticks. These statements which are of a confessional nature were received in evidence and used by the learned sessions judge. Now it is obvious that on one ground alone they are inadmissible. S. 24 of the Evidence Act states, "A confession made by an accused person is irrelevent" and therefore inadmissible in evidence "in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise." It is quite obvious that it must have appeared to the court as it does to us that these statements as proved by P. W. 10 were made in answer to a direct inducement, namely, that a promise that nothing would happen to them if they produced the sticks and knives which were used and that request was preceded by the words 'Did you commit the offence'. The learned sessions judge while recognising that there was an inducement as proved by the village munsif expresses the quite incomprehensible view that such inducement "will not take away from the essential truth of the statements made by them and their production of the weapons used by them." The statements are of course not receivable in evidence at all and therefore their truth could not be the subject of enquiry. Mr. Ethiraj has quite rightly conceded that on this ground alone the statements should have been excluded but in addition an examination of them shows that they were, as far as can be gathered, statements made whilst producing the material objects concerned and therefore not statements in consequence of which a fact was discovered. We use the expression 'as far as can be gathered' because we have been put to some inconvenience in this case by the learned judge recording in Telugu characters the precise statements. The learned judge is entitled to record answers in English and the proper and usual course is to do so. If the learned judge considers that it is

necessary for any particular purpose to record the statements in the language spoken a translation should be added. But in the case of A-1 who brought out the knife there is a record of what he said in Telugu but no translation. Excluding these statements, the result is that the case against these men rests on the evidence of P. W. 4 as corroborated by Ex. F and her conduct and by P. W. 5 and in the case of P. W. 5 by his conduct and his statement Ex. G. No serious criticism can be levelled at the conduct of either of these witnesses. The woman having seen her husband murdered says she immediately went home, sought the aid of the most obvious person, her son-in-law, told him what had happened, sent him to fetch the injured man. The son-in-law in his turn at the earliest opportunity ran and reported to the village munsif what had happened and immediately the munsif came to the spot, the statements Exs. F and G were recorded and apart from the omission in Ex. G. to which reference has been made no criticism worth the name has been launched against him.

The accused in this case who are men of primitive character give no assistance. They content themselves with a denial both at the magistrate's court and at the sessions court, saying that the case has been fabricated by the police. We have therefore no opportunity of judging whether there is any question of considering their whereabouts that night or any alternative story. We are satisfied that the evidence of P.Ws. 4 and 5 is reliable and was properly accepted by the learned sessions judge. There is no circumstance of suspicion in this case at all to suggest that this story—really a very simple story when one comes to examine it—was not the entire truth.

The leared Public Prosecutor has quite rightly touched on an aspect of the case, namely as to whether the evidence in this case is sufficient to prove the intention under S. 34 of the Code, namely, whether murder was the common intention of all these five people or whether a conviction would not be more appropriate under S. 302 read with S. 149 I.P.C. We do not consider it necessary to pursue this topic further because the result will be academic for the following reasons. It relates to a matter of sentence. The accused were all undoubtedly waiting with the intention of committing the most violent assault upon the deceased and it has been proved that one of them used a weapon which, in spite of the contentions of the defence, we regard as an obviously deadly weapon, namely, M. O. 1. We consider that in his case the sentence of death should be confirmed. In the case of the others having, as we have already indicated, regard to the sort of people they are we think it will be enough in the interests of justice if, instead of the sentence of death, a sentence of transporation for life is substituted

The result will therefore be that we consider the conviction of all these five persons for murder was correct and so far as their appeals are concerned they are dismissed. We confirm the sentence of death in the case of the first accused but we set aside the sentence of death in the case of accused 2 to 5 inclusive and instead sentence them to transportation for life.

T. *Appeal dismissed.*

Cr. R. C. Nos. 1005 & 1011 of 1940.

Cr. R. P. No. 957 of 1940.

November 29, 1940.

LAKSHMANA RAO, J.

PERIYANNAN CHETTIAR

v.

EMPEROR.*

Companies Act (VII of 1913), S. 76 (2)—Liability of director—Proof necessary that he was knowingly and wilfully a party to the default.

A *director of a company must be shown to have knowingly and wilfully been a party to the default under S. 76 (2), Companies Act, before he can be convicted.*

The facts appear from the judgment of the lower court which was as follows:

"The charge against the accused "the Cape Comorin Railway and Transport Company Ltd." represented by its managing director T. S. Srinivasa Iyer and the other directors is that they made default in laying before the company in general meeting a balance sheet and profit and loss account within 18 months after the incorporation of the company and thus contravened s. 131 (1) of the Indian Companies Act—an offence punishable under s. 133(3) of the Act.

*1941 M.W.N. 959

2. The 4th and 5th accused are dead and the case against them abates. All the other accused except accused 6 Periannan Chettiar admit the offence. Accused 6 denied the offence and pleads not guilty. Prosecution witness 1 H. Krishnamurthy, Assistant Registrar of Joint Stock Companies says that "the Cape Comorin Railway and Transport Company Ltd.," was registered on 4—6—1938 under the Indian Companies Act. The company filed with prosecution witness 1 the memorandum of articles of association (Ex. A) which contain a copy of the agreement with the managing agent. The list of Directors (Ex. B) as on 30—5—1938 was filed before prosecution witness 1 according to which accused 6 is one of the Directors. Under S. 131 (1) of the Act the Company should adopt the first balance sheet at the general body meeting on or before 4—12—1939. But the balance sheet was not prepared as required. Prosecution witness 1 sent letters to the company and its several directors.

3. The 6th accused says that to his knowledge the company has not even commenced business inasmuch as no member of the public other than those who subscribed to the memorandum had taken any share in the company and that there was no business done by the said company to prepare a balance sheet for its submission under the Indian Companies Act. He adds that he is not knowingly and wilfully a party to the default. He has no witnesses to be examined on his behalf. If no business was done a nil balance sheet should have been prepared. The company and its several directors are liable for the offence. I find them all guilty of the offence with which they are charged. Under s. 245 (2) Cr. P. C. I convict them (accused 1 to accused 3, accused 6 and accused 7) and sentence them each to pay a fine of Rs. 20 or in default to undergo simple imprisonment for one week. Under s. 279 of the Act the fine will be paid to the Assistant Registrar of Joint stock Companies as costs of the prosecution.

Against this order the present revision was filed by the 6th accused.

Petition under Ss. 435 and 439, Cr. P. C., 1898 praying the High Court to revise the judgment of the second presidency magistrate of the court of Presideney Magistrates, George Town, Madras dated 21—10—1940 and passed in C. C. Nos. 2078 & 2079 of 1940,

G. N. Chary, for Petr.
Crown Prosecutor, for Crown.

ORDER

The petitioner was an ordinary director living outside Madras and the evidence does not show that he was knowingly and wilfully a party to the default under S. 76 (2) of the Indian Companies Act. The conviction is therefore set aside and the fine if levied will be refunded.

T. *Conviction set aside.*

Cr. M. P. No. 793 of 1941

August 13, 1941

HORWILL, J.

KRISHNASWAMI GOUNDAN & others
v.
CHINNASWAMI alias Karuppa Goundan*

Cr. P. C. (V of 1898), Ss. 107 & 145—Proper application.

Magistrates have power to proceed under S. 107 Cr. P. C., in preference to S. 145 Cr. P. C. if they think it desirable.

FACTS: In this case the Magistrate passed an order under S. 107 Cr. P. C. in respect of a dispute about land. The petitioners before the High Court were ordered to execute a bond to keep the peace until the conclusion of the enquiry by not entering on the land and obstructing the lessees from carrying on their agricultural operations. The High court was moved to quash the proceedings under S. 107 at this stage.

Petition praying that in the circumstances stated therein the High Court will be pleased to issue an order quashing the Proceedings in M. C. No. 37 of 1941 on the file of the court of the Sub Divisional Magistrate of Gobichettipalayam.

G. Gopalaswami, for Petrs.
N. Somasundaram, for Respt.
Public Prosecutor (*V L. Ethiraj*), for Crown.

ORDER

Magistrates have power to proceed under S. 107, Cr. P. C. in preference to S. 145 of the Cr. P. C. if they think it desirable—See S. 145 (10) and *Belagal Ramacharlu v. Emperor*.

The petition is dismissed.

T. *Petition dismissed.*

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1. (1903) 26 Mad. 471
*1941 M.W.N. 960

Cr. App. No. 255 of 1941

September, 2, 1941

HORWILL, J.

KARUPPAYYA THEVAR

v.

EMPEROR*

Penal Code (XLV of 1860), Ss. 300 & 304—Proper application—Duty of Public Prosecutor.

A person can be guilty of murder even though death is not the necessary consequence of the blow given. A person commits the offence of murder if the act he does is done with the intention of causing bodily injury to the person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Where the blow given to the deceased was a heavy one and caused a severe injury the accused must be presumed to have intended the probable consequence of such a blow. If the injury so caused is sufficient in the ordinary course of nature to cause death the accused commits the offence of murder.

In such a case, if the Public Prosecutor makes a statement that the accused was guily under S. 304. para 2, he does so wrongly. The Public Prosecutor is expected to be fair to an accused person and not to press for the conviction of a graver offence if he thinks a lesser has been committed. On the other hand, it is his duty to put before the sessions judge all that can be said in support of the charge.

The relevant portion of the sessions judge's judgment is as follows:

"...... Now I have to see what offence the accused committed by delivering this blow. As I accept the opinion of P. W. 5, the injury was only likely to cause death and was not necessarily fatal, and as it is clear from the evidence that the accused, an impetuous young man of 22, rushed to the place suddenly perhaps on hearing the pacificatory words of the deceased, and hit her with the stick in sudden fury, obviously without intending to cause her death or to inflict such an injury as was likely to cause her death, but intending only to give her a severe blow, though the blow thus administered by him caused a terrible injury and depressed and fissured fractures underneath it. I agree with the learned Public Prosecutor in holding that the accused would in the circumstances, be liable under S. 304, paragraph 2, I.P.C. and not under S. 302, I.P.C. as charged, or merely under S. 325 I.P.C. as argued by the learned counsel for the accused."

Appeal against the order of the Court of Session of the East Tanjore Division at Negapatam in C.C. No. 14 of 1941.

V. T. Rangaswamy Ayyangar, for Applt.
A. S. Sivakaminathan, for Crown.

JUDGMENT

The learned Sessions Judge of East Tanjore charged the Appellant with the murder of Visalakshi Ammal by striking her on the head with a heavy stick and causing an extensive fracture of the skull. He however found him guilty only under S. 304, para 2 I.P.C. and sentenced him to seven years rigorous imprisonment.

According to the prosecution evidence, there was a quarrel because P.W 7 had stolen a chisel from Rangasami Asari, a relative of the accused, when Rangasamy Asari failed to pay P.W. 7 his wages On the 11th of September, P.W. 7 was beaten by the accused, and on the following day, i.e , on the 12th, Murugayya and Rangasami Asari went to P. W. 8's house and continued the quarrel. There was also a disturbance in the early evening of the 13th. The actual attack which resulted in the murder took place at about 8 p.m., and it arose because P.W. 4 a respectable man in the village, went to the persons who were quarrelling and attempted to pacify them. He was accompanied by his aged father (P.W. 6) and his mother, the deceased. The accused, a young man of 22 or so, seems to have got incensed at the interference. Finding it easier to deal with a woman than with a man, he struck the deceased with his stick, fracturing her skull. He then ran after P.W. 8, another elderly woman, but she was fortunately able to escape into her house and secure the door.

The murder is spoken to by as many as six eye witnesses. Although P.Ws. 4 and 6 are closely related to the deceased, there is no reason why their evidence should not be accepted. On the contrary, it seems

* 1941 M.W.N. 1025

most unlikely that P.Ws. 4 and 6, with whom the deceased went to pacify the accused, would foist this murder on the accused, with whom they had no quarrel whatsoever. The dispute was between P.Ws 7 and 8 on the one hand and Rangasami Asari and Murugayya on the other. P.Ws 4 and 6 had no concern with the matter at all except as elders asked to intervene. P.Ws. 9 and 10 are also trustworthy witnesses.

The learned advocate for the appellant has relied on certain discrepancies in the medical evidence, and has argued that—contrary to the prosecution story—the deceased probably received two blows, because she had one injury on the forehead to the left side of the middle line and also what is commonly known as a black eye on the other side. The young lady Assistant Surgeon was quite sure that these were due to two distinct blows; but the two much older men doctors (P.Ws. 3 and 5) were of opinion that they might well have been caused by one blow; for one of the fractures radiating from a central depressed fracture extended to the right orbital cavity. This particular radial fracture might well have led to an extravacation of blood which would have made the skin appear blue. It was not however necessary for the Court to have tried to reconcile the various statements made by expert witnesses with regard to the nature of the blows which caused the injuries, it should have asked itself whether the medical evidence precluded the prosecution story. The prosecution witnesses stated that there was only one blow, and although the evidence of P. W. 2 may be said to be inconsistent with that, yet reading the medical evidence as a whole, it cannot be said to render the prosecution story unworthy of credit.

Considerable reliance has been placed on the defence evidence of *alibi* which is to the effect that the accused was laid up with typhoid fever at the time when this offence was committed. The learned advocate for the appellant does not go so far as to say in this court that the accused had satisfactorily proved that he was laid up with typhoid fever, but he does rely on two post cards dated the 9th and 11th of September written by the father of the accused to D.W. 1 at Alathur. These post-cards indicate that the accused was staying with D.W. 1 when those cards were written. One of the post-marks on the second letter, Ex. XIV, is 'Memisal 11-30 a. m., 13th of September 1940'. The probative value of a postal stamp is not very high, but if it was true, it was probable that when that post-card arrived, the accused was staying at Alathur, which is about three fourth of a mile from the Post office. The learned Advocate for the appellant contends that if the accused was there at noon on the day of the offence it is most unlikely that he was present at the village of offence (Ettugudi) when the witnesses say. The question is not, however, whether it was probable or not that the accused was present but whether one can be absolutely sure that the accused was not present. No evidence as to the exact distance from Alathur to Ettugudi has been given, but D. W. 2 says that one has to go five miles by cart, 32 miles by bus, 6 hours by railway, and then six miles by cart, and that it would take 12 hours to do this, I am not however prepared to conclude, merely on D W. 2's evidence, that that is the only and the quickest way of getting to Ettugudi, and so, even if the post-cards are true and the accused was in the village of Alathur at noon on the day of offence, I am not prepared to say that he could not have been in Ettugudi by 8 p. m. The fact that the accused was not seen at any of the earlier quarrels on the day of offence or on the previous day makes it not improbable that he left for his village only after receiving Ex. XIV. If these post-cards are true, the evidence of P. Ws. 7 and 8 with regard to the incident on the 11th cannot be true, but that is not material to the consideration of what happened when this murder was committed. That is spoken to by a number of persons who do not say that they saw the accused in the village on the 11th.

I therefore find no reason for not agreeing with the learned Sessions Judge that it was the accused who had committed this offence.

The accused put forward a theory that the deceased fell on a survey stone, but there is no evidence at all that she did so. It is unworthy of consideration in the face of the evidence of so many eye witnesses.

The learned Sessions Judge, instead of finding the accused guilty of murder, has found him guilty only under S. 304 para 2 I. P. C., holding that although the accused should have known that death was a likely result of such a blow, death was not the necessary consequence of it. He seeks support for that conclusion from the

evidence of P. W. 5, one of the doctors examined. P. Ws. 2 and 3 say that death was the necessary consequence of the blow, but P. W. 5 says that it was not a necessary result but only likely. He appears to have used the word 'likely' in contra-distinction to 'necessary'. A person can be guilty of murder even though death is not a necessary consequence, of the blow given. Persons make remarkable recoveries at times from severe injuries that ordinarily lead to death. P. W. 5 does not explain how the deceased could have recovered from a depressed and extensively radiating fracture, but perhaps the piece of bone that was depressed could have been removed by operation. Ordinarily, however an injury of the nature caused to the deceased ends fatally. Even P. W. 5 says that death might have resulted instantaneously from such an injury, and it is one's experience that injuries of this kind ordinarily end fatally. A person commits the offence of murder if the act he does is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The blow given to the deceased must have been a very heavy one to have caused such a severe injury, and the accused must be presumed to have intended the probable consequence of such a blow. The injury so caused being sufficient in the ordinary course to cause death, the accused committed the offence of murder and should have been convicted accordingly. The learned Public Prosecutor thinks that the learned Sessions Judge may have felt himself restrained by an apparent admission of the Public Prosecutor of East Tanjore that the offence committed was not that of murder. If the local Public Prosecutor made such a statement he did wrongly. One expects a Public Prosecutor to be fair to an accused person and not to press for a conviction of a graver offence if he thinks a lesser has been committed. On the other hand, it is his duty to put before the Sessions Judge all that can be said in support of the charge. To do the Public Prosecutor justice, however, I very much doubt whether the learned Sessions Judge felt himself restrained in any way by anything that the learned local Public Prosecutor said.

The conviction and sentence are affirmed and the appeal dismissed,

N.T.R. *Conviction confirmed.*

Cr. R. C. No. 538 of 1941.

Cr. R. P. No. 507 of 1941

September 10, 1941.

HORWILL J.

KUMARASWAMY KALINGA RAYAR & others
v.
EMPEROR *

Cr. P. C. (V of 1898), S. 350 (1), proviso (a)—Transfer at the instance of some accused without notice to others—Not illegal—Recall of witnesses examined—No right in the accused.

Where the case has been transferred at the instance of a few of the accused without notice to the others the transfer of the case is not illegal. The petitioners have no right to have the witnesses examined before the first court recalled by the transferee court.

FACTS: The petitioners in this case are some of the accused. They along with others have been charged under Ss 144, 342, 366, and 448 I. P. C The case was enquired into by the 2nd class magistrate, Papanasam, and 13 witnesses were examined. 9 of the accused other than the present petitioners filed an application for transfer before the Sub Collector, Kumbakonam, on the plea that the magistrate did not conduct the enquiry properly. The Sub Collector tranferred the case to the second class magistrate, Kumbakonam, without notice to the present petitioners. After the transfer the petitioners objected to the enquiry for want of notice and also stated that 13 witnesses had already been examined and that there ought to be a de novo trial and that they must be summoned by the tranferee court. The sub magistrate Kumbakonam passed the following order: "This is a case dragging on for a long time past. I see no reason to grant the request."

Thereupon, a revision was filed that S. 350, Cl. 1 and proviso (a), applies to the case that the order of transfer without notice to the petitioners was illegal.

Petition under S. 435 and 439 of the Cr. P.C. 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Kumbakonam dated 4-6-1941 and made on the petition by the accused 13, 3, 9 and 11 (the petitioners herein) in P. R. C. No. 6 of 1941.

T. S. Raghavachariar, for Petrs.

N. Somasundaram, for P.W. 2.

Public Prosecutor, (*V. L. Ethiraj*), for Crown.

*1941 M.W.N. 1027

ORDER.

The transfer of the case to another Magistrate without notice to the petitioners was not illegal.

The petitioners had no right to have witnesses recalled. The Magistrate gave reasons for not wishing to do so.

The petition is dismissed.

T. *Petition dismissed.*

Cr. App. No. 352 of 1941.

September, 3, 1941.

HORWILL, J.

KANDASAMI SOLAGAR

v.

EMPEROR*

Penal Code (*XLV of* 1860), *Ss.* 300, 302 & 304 *—Blow with heavy stick on head—Death—Offence—Concession by Public Prosecutor—Effect.*

Where the accused gave a heavy blow on the head of an old woman with a stick which was three fingers in diameter with a ferrule at the end, breaking her temporal bone into several pieces.

Held, *that the offence committed by the accused was murder and not one under S. 304, Part II, I.P.C.*

Where the Public Prosecutor has conceded that the offence is only under S. 304, I.P.C, it is not the policy of Crown to press for a conviction for a more serious offence.

FACTS: The relevant portion of the Judgment of the Sessions Judge was as follows:

"18. The question now is what offence the accused has committed The Public Prosecutor at the time of arguments fairly conceded that the offence cannot be said to be one of murder, but would fall under culpable homicide not amounting to murder, under S. 304 Part II I.P.C. The Public Prosecutor is quite correct. It is most unlikely that the accused had the intention to cause the death of the deceased his own farm servant or cause her such bodily injury as is likely to cause her death. In a moment of excitement and anger he beat her without much forethought. Whatever that may be, having regard to the nature of the weapon used and the part of the body on which he beat the deceased and the injury caused, it is not difficult to attribute to the accused the knowledge that his act would likely cause the death of the deceased. Disagreeing with the assessors, I find the accused guilty under S. 304 Part II, I. P. C. and convict him accordingly. I sentence the accused to suffer rigorous imprisonment for four years."

Appeal against the order of the Court of Session of the West Tanjore Division at Tanjore in C. C. No. 8 of 1941

M. Ranganatha Sastri, for accused.

A. S. Sivakaminathan, for Crown.

JUDGMENT

The appellant has been convicted by the Sessions Judge of West Tanjore of an offence punishable under S. 304, Part II, I. P. C. and sentenced to rigorous imprisonment for four years.

The deceased was an old lady of 55 years of age and she, like her son P. W. 8 and his brother, were farm servants of the accused. On the day of offence, P. W. 8 and his mother came to the field of the accused without the brother of P. W. 8 and they were at once taken to task by the accused for not bringing him. P. W. 8 gave an excuse which obviously did not satisfy the accused, and so the accused attempted to beat him. Fortunately for P. W. 8, he was able to run away and received a mere glancing blow on the back which did not cause any injury. The deceased saw that the accused was attempting to strike her son and so she intervened on his behalf and scolded the accused for attacking her son. Unfortunately for her, the accused was very irritable because he had been beaten just before by P.Ws. 5 and 11 and others. Being in a bad temper and irritated by her interference, he raised a stout ferruled stick which he had in his hand and gave her such a severe blow on the head as to cause her death. This is spoken to not only by P.W. 8, but by P.Ws. 9 and 10, who were working in the neighbourhood.

As soon as his mother had fallen to the ground, P.W. 8 went to a village three miles away to inform his brother. The offence took place at about 10 O'clock but by the time he had brought back his brother and they had together gone to the munsif's house 1½ miles away and found him absent and then traced him to the scene of offence, it was 5-30 p.m. The village magistrate (P.W. 12) had gone to

* 1941 M.W.N. 1028

the scene of offence on the information of D. W. 1, the brother of the accused, and had taken a statement from the accused himself, who had said that a number of persons (seven in number) including P. Ws. 5 to 7 and 11 had attacked him and those working for him and had killed the deceased.

Most of the remaining prosecution witnesses speak to the incident which is referred to in the statement of the accused and which, if the prosecution story is true, is entirely irrelevant, because the incident in which the deceased met with her death had absolutely no connection with what had happened before, The prosecution story as to the earlier incident is that P. Ws. 5 and 11, who were in turn married to the niece of the accused and had paid the accused a bride's price, and had subsequently been discarded in favour of another man, but the bride's price had not been returned. On the day in question, they went to the field where the accused was harvesting the crops and said that they would not allow the harvest to proceed unless the fifty rupees which had been paid by them were returned. During the subsequent disturbance, P. Ws. 5 and 11 received some blows but no serious injuries, while the accused had received a few cuts and other injuries. D W. 1, brother of the accused, had two contusions and D.W. 10, the son of the accused, also received an injury. P.Ws 5 to 7 and 9 to 11 say that after this disturbance most of the witnesses went away. P.Ws 9 and 10 returned to their fields, which adjoin the field in which this offence occurred. It was only after the fight was over, they say, that P.W. 8 and the deceased came on the scene.

One's first impulse is to suspect that there were not two incidents, separated by 20 minutes to 3/4 hour, but one incident, the fight in which so many persons were injured. It seems more plausible that the deceased met her death while she and P.W. 8 were taking their master's part and received her injuries at the hands of P.W. 5 or P W. 11 or one of their friends. That suspicion receives confirmation from the fact that the accused remained at the scene of offence and implicated P.Ws. 5 and 11 and their pangalis within an hour and half of the commission of the offence. Further, it is pointed out that the statement which P.W. 8 made was as late as 5-30 p.m. and even then was rather vague and omitted many details given in the Sessions Court. However, there are serious difficulties in accepting the story of the accused, despite first impressions that there was something in it. It could not have been the case that P. Ws. 5 and 11 and others came and deliberately attacked the deceased. She was an old woman and she herself could have taken no part in the affray. It is suggested by the learned counsel for the accused that some blow intended for some male conspirator of the accused may have fallen on her, but the nature of the injuries makes that view impossible. She received not merely one fatal blow but three substantial blows, each of which caused a severe injury. Her right temporal bone was broken into pieces; in addition to that she had a contused punctured wound on her head and an injury to her arm, which shows that there was a deliberate attack made on her. This does not fit in very well with the accused's account of what happened that day in his field. The injuries are however easily explicable on the basis of the prosecution story for the accused, having become angry on account of the incident 20 to 45 minutes earlier, was ready to vent his spleen on the deceased because she intervened to prevent him from beating P. W. 8. Then the evidence of the Village Magistrate is fatal to the accused's case. D.W. 1 came to him at about 11-30 a.m and told him that the villagers were joining together and were going to beat the accused and that the latter had asked him to bring the village magistrate before they did so. This is consonant with the prosecution case that there had been a preliminary affray, for this messenger was sent to P.W. 12 because the accused apprehended that P.Ws. 5 and 11 would return in force with their pangalis and inflict a further beating. If the deceased had really been killed in the earlier fighting, D.W. 1 would certainly have told P.W. 12 so. It is argued that P.W. 12 is not completely trustworthy because he admits in cross-examination that he is related to P.Ws 5 and 11 and others. Unfortunately, the prosecution did not ask P.W. 12 what exactly the relationship was or whether he was not also related to the accused, but it is in evidence that P.Ws. 5 and 11 are the first cousins once removed of the accused and so any person distantly related to P.Ws. 5 and 11 would also be related to the accused. Moreover, the conduct of P.W. 12 does not suggest that he was in any way partial. He

acted on the information given to him by D. W. 1 and went to the scene of offence at once and recorded the statement of the accused. That statement he sent without any delay to the police, and it was on the accused's statement that the police came to the village. It was only when the police reached the village that the statement of P. W. 8 was handed over to the police. The Head Constable says that the statement of P. W. 8 was given to him at 10 p. m. and there is no reason to doubt the truth of his evidence; for it could have been a matter of no consequence to the police whether P. W. 11, was booked for this offence or the accused.

The prosecution story is spoken to by three witnesses. Although P. W. 9 may be interested and his evidence has to be accepted with caution, P. W. 10, a distant relative of the parties, seems to be quite disinterested Finally, there is the evidence of P. W 8, who was the farm servant of the accused, and who, if the accused's story is true, was present with his mother and helping the accused. If his mother had been killed and he was struck, as D. W. 1 says, by P.W. 11 he would have been only too eager to complain against P. W. 11 for dealing these savage blows at his mother. The accused has attempted to show that P.W. 8 was bought over. It is said that P.W. 5 sold a piece of land to P.W. 7, that P.W. 7 subsequently transferred the land to a distant relative of P.W. 8, and that P. W. 8 attested the document. No evidence that is worthy of any credence has been adduced to show that P.W. 8 received any benefit from these transactions. Moreover, these transactions took place long after the offence was committed. If P. W. 8's support was bought, he must have been persuaded before 5-30 p.m. —or at any rate before 10 p.m —on the day of the offence. He obviously could not have accepted the overtures of the prosecution party without consulting his brother; and by the time he had brought his brother and had gone to the village munsif's house and brought other pangalis—as he apparently did —there was little time left for him to enter into negotiations with the prosecution party to exculpate P. W. 11 and to foist the case on the accused.

A number of witnesses were examined in the Sessions Court for the defence, but they did not figure very well in the witness box, and so the learned counsel for the appellant has rightly not sought to place any reliance on their evidence.

I am therefore satisfied that the learned Sessions Judge came to the correct conclusion that it was the accused who caused this fatal injury.

To pick up a stick which is said to be three fingers in diameter with a ferrule at the end and which, from the nature of the injuries, must have been a very heavy one, and to give an old woman such a heavy blow on the head so as to break her temporal bone into several pieces is certainly, in the words of clause (3) of S. 300 I.P.C. to do an act with the intention of causing such bodily injury to the deceased, as was found in the post-mortem examination. That injury was undoubtedly sufficient, in the words of the same clause, in the ordinary course of nature, to cause death. In fact, it would have been most remarkable if she had survived such a severe beating. Death was inevitable, and the evidence shows that she died almost instantaneously. The accused therefore committed murder and the learned Sessions Judge was wrong in convicting him only under S. 304, Part II. However, the learned Sessions Judge has taken shelter behind the Public Prosecutor, and it is not the policy of the Crown to press for a conviction for a more serious offence if the local representative of the Crown has represented that such an offence was not committed No notice has therefore gone to the accused to show cause why the sentence should not be enhanced.

The sentence in the circumstances is a light one. The conviction and sentence are affirmed and the appeal dismissed.

N.T.R. — *Conviction confirmed.*

Cr. R.C. No. 329 of 1940.

Cr. R P. No. 318 of 1940

October 18, 1940.

LAKSHMANA RAO, J.

THANDRA NARASIMHAPPADU v. EMPEROR

Penal Code (XLV of 1860), S. 188 (2)—Final order under S. 145 Cr. P. C.—Counter petitioners raised crop and harvested before possession restored to opposite party—No disobedience.

*1941 M.W.N. 1030

In proceedings under S. 145 Cr. P. C. a preliminary order was passed forbidding both parties to enter on the land and a final order was passed and within a few days of it, the appellants harvested the paddy they raised and pleaded that they had no knowledge of the order. The appellants were convicted for disobedience of the order. In revision.

Held, *that as the crop was raised by them and it was harvested before possession was restored to the opposite party there was no disobedience of the order prohibiting the petitioner from interfering with posesssion of the apposite party and the conviction under S. 188 (2) I. P. C. was unsustainable.*

FACTS: The appellants were the counter petitioners in a case under s. 145 Cr. P. C. on the file of the special first class magistrate, Chicacole. The preliminary order was made on 17-8-38 restraining both the parties from interfering with the lands and after a contest final order under s. 145 (6) was passed on 23-11-38. Four days later on 27-11-38 it was alleged that the appellants entered upon and cut the paddy crop on a portion of the disputed land. The special 1st class magistrate sanctioned the prosecution of the appellants for offences under Ss. 188 and 379 I.P.C. The offence under s. 379 was sought to be supported on the ground that the preliminary order prohibiting both parties from interfering with the land until final orders are passed was tantamount to the attachment of the land. The sub magistrate disallowed this objection and held that the charge under s. 379 was not maintainable. On the question whether the accused disobeyed the final order, the final order ran as follows: 'I therefore under s. 145 (6) Cr. P. C. restore possession of all lands in dispute to the petitioners together with standidg crops, if any, and declare them to be persons entitled to possession until evicted therefrom in due course of law and forbid all disturbance of such possession until such eviction.' It was in evidence that the counter petitioner raised seedlings in a part of the land in June and at the time of the final order there was ripe paddy fit to be harvested and the final order was served on the accused only after crop was cut. The first accused further pleaded that he was not aware of these orders. The sub magistrate found that the first accused had knowledge of the order though not served with it it and convicted him under S. 188 (2) I.P.C. The appellate magistrate confirmed the finding and sntence of the lower court.

Petition under Ss. 435 & 439 Cr. P C. 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Chicacole dated 15-4-1940 in Cr. App. No. 27 of 1940 preferred against the judgment of the court of the stationary sub magistrate of Chicacole in C.C. No. 1498 of 1938.

K. S. Jayarama Iyer & C. V. Dikshitulu, for Petr.

Public Prosecutor, (*V. L. Ethiraj*), for Crown.

ORDER

The crop was raised by the petitioner and it was harvested by him before possession was restored to the opposite party. There was therefore no disobedience of the order prohibiting the petitioner from interferring with possession of the opposite party and the conviction under S. 188 (2), I. P. C. is unsustainable. The conviction and sentence of the petitioner are therefore set aside and his bail bonds will be cancelled.

N.T.R. — *Conviction set aside.*

Cr. R. C. Nos. 547, 548 & 549 of 1941
Case Ref. Nos. 33, 34 & 35 of 1941
August 28, 1941
BURN, J.

KORA VATHAN
v.
EMPEROR*

Cr.P.C. (V of 1898), s. 397, second proviso — Conviction for substantive offence — Imprisonment under s. 123, how both to take effect.

The accused was sentenced to undergo rigorous imprisonment for one year in default of furnishing security under s. 123 Cr. P. C. on 6—12—40. While serving the sentence the prisoner was sentenced under ss. 457 and 380 and 75 I.P.C. to imprisonment for six months for an offence committed in 1938. The sub magistrate directed that these sentences should take effect after the expiry of the sentence passed under s. 123.

Held, *that the order was illegal and that the sentences must take effect from the dates on which they were pronounced.*

The facts appear from the order of reference which was as follows:

In M. C. 44 of 40 on the file of the Sub Divisional Magistrate, Tiruvannamalai one Kora Vathan was sentenced to undergo

* (1941) M.W.N. 1031

rigorous imprisonment for one year in default of furnishing security under S. 123 Cr. P.C. This order was passed on 6-12-40. While serving this sentence the prisoner was tried by the Sub Magistrate, Ulundurpet in C.C. No. 1057 of 1938 on his file for an offence under Ss. 457, 380 or 411 and 75 I.P.C. committed on 30-6-1938 and was sentenced to undergo rigorous imprisonment for 6 months. The Sub Magistrate directed that this sentence should take effect *after* the expiry of the sentence passed under s 123 Cr.P.C. by the Sub Divisional Magistrate Tiruvannamalai.

As the offence concerned in C.C No. 1057 of 1938 on the file of the sub magistrate Ulundurpet was committed prior to the order under s. 123 Cr.P C. passed by the Sub Divisional Magistrate, Tiruvannamalai, the sentence awarded by the Sub Magistrate should take effect *immediately* according to the second proviso to s 397, Cr.P.C. Hence, the order of the Sub Magistrate directing that the sentence should take effect after the expiry of the sentence passed under s. 123 Cr. P. C. is illegal. I therefore request that the High Court may be pleased to revise the order of the Sub Magistrate."

Case referred for the orders of the High Court under s. 438, Cr. P. C. by the District Magistrate South Arcot in his letter R.O.C. No. 1355.41 dated 30—6—1941 and by the District Magistrate of North Arcot at Vellore in his letter No. 2005-41, dated 30—6—1941.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

Accused not represented,

ORDER.

In these cases the order directing the substantive sentences of imprisonment to take effect on the expiry of the periods of imprisonment imposed under s. 123, Cr.P.C., is illegal, Vide the second proviso to s. 397, Cr.P.C. The order in each of these cases is accordingly set aside. The sentence in each case must take effect from the date on which it was pronounced.

N.T.R.

Cr. R. C. No. 739 of 1941
Cr. R. P No. 694 of 1941
September 24, 1941.
HORWILL J.

K. K. NARAYANAN NAMBIAR
v.
EMPEROR.

Cr. P. C. (V of 1898), S. 540—Exercise of discretion under.

The Court is not precluded from exercising its discretion under S. 540 Cr. P. C., merely because the parties asked it to do so.

S. 540 is not intended only for the benefit of the accused. It would not be an improper exercise of the powers of the court under S 540 merely because the evidence taken supports the case of the prosecution and not that of the accused. The court has power under S. 540 to examine a witness even to rebut defence witnesses, but those powers should be sparingly invoked for such a purpose.

Where a magistrate examined a person as a court witness not for the sole purpose of contradicting a defence witness, but the main object of his examination was to explain a particular circumstance appearing in the evidence the magistrate cannot be said to have exercised his discretion improperly in examining the witness.

Petition under Ss. 435 and 439, Cr.P.C., 1898, praying the High Court to revise the judgment of the Court of Session of the South Malabar Division at Calicut, dated 21—7—1941 and passed in Cr. App. No. 36 of 1941, preferred aginst the Judgment of the Court of the Sub Divisional Magistrate of Calicut in C. C. No. 47 of 1941.

V. V. Srinivasa Ayyangar & M. C Sridharan, for Petr.

Public Prosecutor (V.L. Ethiraj) for Crown.

ODER.

The petitioner was convicted under s. 409, I.P.C. of committing criminal breach of trust by dishonestly misappropriating a sum of Rs. 118-15-0 entrusted to him in his capacity as Head Clerk, District Court, North Malabar; and the offence is said to have been committed between the 2nd December 1940 and the 17th of that month. His appeal was dismissed, the conviction and sentence being affirmed.

The principal question which arises in this petition is whether the learned Magistrate, purporting to act under s. 540 Cr.P.C. exercised his discretion improperly in admitting the evidence of a person who was examined as P. W. 1. The prosecution let in evidence through P. Ws 8

* 1941 M.W.N. 1032

and 9 that on the 14th December 1940, the petitioner took a sum of Rs. 9 out of the bag in which he kept his money as Head Clerk and gave it to P. W. 2 to purchase seven stamp papers, which were subsequently handed over to P. W. 8. Formal evidence was given to this effect and there was not much cross-examination on this point. The reverse sides of the stamp papers however show that six of them were purchased in the name of one Appu Nair and one in the name of a still different person. There was therefore a possibility that the Court might be unable to accept the evidence of P. W. 9 in the face of the endorsements of the Stamp vendor. The seventh paper was dated the 4th December 1940, ten days before P. W. 9 is said to have made the purchase. Not unnaturally, the accused exploited these endorsements and examined a man who bore the name of Appu Nair and who deposed that he had purchased these papers. Faced with the possibility that P. Ws. 8 and 9 might be disbelieved because of an apparent discrepancy which he knew could be easily explained, the Public Prosecutor filed an application in the Magistrate's court asking him to exercise his discretion under s. 540, Cr. P. C. and examine the stamp vendor as a witness. He did so; and the stamp vendor explained how it was possible for a person to purchase a stamp paper and yet for one to find some other name on the reverse. He also deposed that the Appu Nair whose name appeared on the reverse of six of the stamp papers was not D. W. 6 but an Appu Nair residing in an entirely different village to that in which D. W. 6 was living.

As will be seen from the wording of s. 540, Cr. P. C., it is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate requires however, a corresponding caution in using these powers.

In the many cases cited by Mr. Srinivasa Ayyangar on behalf of the petitioner, various views have been expressed with regard to the power of the court to examine witnesses after the defence case has been closed; but in all those cases it was obvious that the power had been misused. In *Rex* v. *Dora Harris* (1), the Recorder permitted the examination as a Court witness of a co-accused who had throughout the trial been standing in the dock by the side of the accused against whom this evidence was let in and who was admittedly an accomplice. Avory, J. who delivered the judgment of the Court, quotes at page 594 the rule laid down by Tindall, J. in *Rex* v. *Frost* (2).

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins, but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown."

However, in expressing the considered opinion of the Bench Avory, J. himself lays no restricting rule. He says.

"In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant."

In India we are governed by the express provisions of S. 540 Cr.P.C. which, as I have said, is extremely wide in its terms. In *Sital Singh* v. *Dalranjan Singh* (3), after the prosecution case had been closed, the prosecution put in an entirely fresh list of witnesses to be called, and the learned judge held that that was an abuse of S. 540 Cr.P.C. In *Ramachandra Prasad* v. *Emperor* (4), the learned Judge found that the object of the additional evidence was merely to fill in an important gap in the prosecution case and that it would be wrong for a court to invoke S. 540 Cr.P.C for that purpose In *Narayana Nair* v. *Bhargavi Amma* (5), Curgenven, J. found that the prosecution evidence as originally let in disclosed no case against the accused at all and that the court had based its finding against the accused exclusively on evidence adduced subsequently. In *Collett* v. *Emperor* (6), the Prosecuting Inspector had deliberately refrained from examining the wife of the accused because he knew that she would not give evidence in support of the prose-

1. (1927) 2 K. B. 587.
2. 9 C. & P.
3. (1914) 12 A.L.J. 15
4. (1937) A.I.R. Pat. 246
5. (1927) 25 L.W. 151
6. (1929) M.W.N. 395: Cr. 69

cution. He therefore adopted the plan of persuading the Judge to examine her as a Court witness, so that he could cross examine her. It was held that that was a gross abuse of the exercise of the powers given to the Magistrate under S. 540, Cr.P.C. Nevertheless, it was found that there was abundant other evidence, and the convictions were confirmed. In *Natabar Ghose* v. *Adya Nath* (7) some general remarks on the use of S. 540 are found, but no reasons are given for the particular decision arrived at. In *Emperor* v. *Satyendra Kumar* (8), the abuse of S. 540 Cr.P.C. was of the same nature as in *Collet* v. *Emperor* (6). In *Udho Ram* v. *The Crown* (9), the Magistrate, after hearing the evidence of both sides and the arguments, when nothing remained but to pronounce judgment, suddenly decided to hold a local inspection and, without any notice either to the prosecution or the accused, examined, four witnesses at the scene of offence.

Mr. Srinivasa Ayyangar particularly relies on some remarks to be found in *Sital Singh* v. *Darlanjan Singh* (3), that no witnesses should be examined at the bidding of any person; and he argues in this case that this C.W. 1 was examined at the bidding of the prosecution and that therefore the accused was prejudiced. I cannot however see how a court is precluded from exercising its discretion under S 540, Cr.P.C. merely because somebody asks it to do so. It is also argued that S. 540 Cr. P. C. is intended only for the benefit of the accused I see no reason why S. 540 Cr. P. C. should be so limited. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the court to summon that witness under S. 540, Cr. P. C. merely because the evidence supports the case of the prosecution and not that of the accused. It is possible to argue that the Public Prosecutor should have foreseen that there was a discrepancy between what P. W. 9 was going to speak to and the endorsements on the stamp papers, which the accused would be certain to exploit, and that he should therefore have examined the stamp vendor to explain this discrepancy; but I do not think that this lack of foresight on the part of the prosecution should preclude the Court from examining the stamp vendor and clearing up the point. It is true that C. W. 1 not only gave evidence to explain the apparent discrepancy but contradicted D. W. 6 by saying that the Appu Nair whose name appeared on the reverse of the stamp papers was not this witness I am of opinion that the Court has power under s. 540, Cr. P. C. to examine a witness even to rebut defence evidence; but clearly those powers should be sparingly invoked for such a purpose. If a witness were examined under s. 540 to contradict defence witnesses, then the accused might demand that further witnesses should be examined by the court under the same section to contradict the prior witness examined and thus lead to that improper prolonging of a case so strongly condemned in the Allahabad case. If, in the present case, the learned Magistrate had examined C W. 1 for the sole purpose of contradicting D. W. 6, I might have been inclined to hold that he had not exercised his powers under s. 540 judicially; but the main object of his examination was undoubtedly to explain how the name of a person could appear as vendee on the back of a stamp-paper when that person had not purchased it. I am unable to say therefore that the Magistrate did not exercise his discretion properly in examining C.W. 1.

It has been said that no notice was given to the accused of the intention of the Court to examine C. W. 1. That is not legally necessary; but if an accused person is suddenly called upon to meet evidence which he does not know is going to be adduced, he may well be prejudiced. The order here was passed on the 12th May and he was not examined until the 26th May and, as can be seen from the cross examination of that witness, the learned counsel for the accused was quite prepared to meet this additional evidence.

On the appreciation of the evidence of the prosecution witnesses, the defence witnesses, and the court witness, I see no reason to interfere There are concurrent findings of fact in the Magistrate's court and in the Sessions Court.

The petition is accordingly dismissed.

N.T.R. — *Petition dismissed*

7. (1923) A.I.R. Cal. 690
8 (1923) A.I.R. Cal. 463
9. (1929) 10 Lah. 790

Cr. R. C. No. 434 of 1941.

Cr. R. P. No. 457 of 1941.

August 29, 1941.

BURN, J.

K. R. KALYANARAMA AYYAR

v.

EMPEROR.*

Defence of India Act (XXXV of 1939), S. 2 Defence of India Rules, R. 34 (6)—'Prejudicial act'—Scope of.

The contention that the petitioner's speech must be considered as a whole and that he could not be convicted unless the whole speech were found to be a prejudicial act, not accepted. Any particular portion of the speech can constitute a prejudicial act.

FACTS: In this case a charge was laid against the accused under r. 38 (1) (a) read with r. 38 (5) of the Defence of India Rules. The accused is the Secretary of the North Arcot District Congress Committee and is charged with having delivered a speech which constitutes a prejudicial act as defined in r. 34 (6) (d) (e) (j) and (k) of the Defence of India Rules The subject of the address was 'the present situation and our duty.' A head constable was deputed orally to attend the meeting and take down notes of the speeches delivered. The entire speech was not recorded by the head constable but only the portions that he considered objectionable. The 1st court found the accused guilty and sentenced him to undergo rigorous imprisonment for eight months and to pay a fine of Rs. 250.

The Sessions Judge confirmed the sentence observing:

" . . Coming now to the statements themselves, statements merely to the effect that coercion was being employed in collecting funds for the war, or that such complaints were being made and that they must be enquired into, do not in my opinion fall within the scope of any of the definition of 'prejudicial acts.' It is at least doubtful whether even the statement that war news published in the papers and broadcast through radio was unreliable, since part of the truth was suppressed, would constitute a 'prejudicial act.' If the speaker had proceeded further and hinted or signified that the progress of the war was much more unfavourable to the Allies than was represented by the news, this might fairly constitute a 'prejudicial act' under s. 34 (6) (g) viz. 'to cause fear or alarm to the public or to any section of the public'. But the other statements of the accused (1) that the war was being waged by Britain only to further British interest and hence that people should withhold financial and other support to the war (2) that the war was directly causing starvation in this country, (3) that there would be no peace or happiness unless the British Government in India was overthrown, and (4) that people should refuse to enlist in any of His Majesty's Forces, clearly constitute prejudicial acts as defined in r. 34 (6) (d) (e) (j) and (k).

I hold that the conviction was justified on the merits. Regarding the sentence, I think that there is much to be said for the argument that the appellant did not intend to deliver this speech in transgression of the criminal law, because it is clear enough from the general purport and tenor of the speech that he was mainly concerned to prevent unauthorised acts of 'satyagraha' and to enlist sympathy for the Congress. Intention of course has to be judged from acts, and even isolated statements might constitute 'prejudicial acts', but the main drift must also be considered, in fairness to the accused. The meeting was poorly attended, in spite of publicity given by handbills etc. and it is not likely that it had any marked prejudicial effect. There are ample signs that people in this country are becoming increasingly conscious of the folly and unwisdom of isolation from the war, or of obstructing the war effort of the Government, in active or passive manner. In view of these considerations, I would reduce the sentence imposed to three months' rigorous imprisonment. The sentence of fine with provision for default will stand "

A revision was filed in the High Court. The grounds were *inter alia*.

'The courts below should have held that the effect and meaning of stray sentences cannot be judged without a reasonably fair record of the entire speech being available.

The courts below should have seen that the prosecution evidence in this case amounts virtually to evidence of the impressions or opinions of certain witnesses about the speech and that a conviction cannot be based on such impressions.

The courts below should have held that there was no safe or reliable record even of

*1941 .W.N. 1035

the stray sentences in the speech of which evidence has been given."

Petition under Ss. 435 & 439 Cr. P. C. 1898, praying the High Court to revise the judgment of the court of session of the North Arcot Division in C. A. No. 16 of 1941, preferred against the judgment of the court of the joint magistrate of Tirupattur in C. C. No. 151 of 1940.

B. Jagannadha Das, for Petr.
Public Prosecutor, (V. L. Ethiraj), for Crown.

ORDER

The findings of fact are sufficient to sustain the conviction. It is not possible to accept the contention of learned counsel for the petitioner that the petitioner's speech must be considered as a whole and that he could not be convicted unless the whole speech were found to be a 'prejudicial act'. I see no good reason for supposing that a particular portion of a speech cannot constitute a 'prejudicial act.'

There is therefore no ground for interference with the conviction. Learned counsel for the petitioner has urged that the sentence of fine should be remitted or largely reduced since the petitioner is not a wealthy man. As the learned Sessions Judge has already reduced the sentence of imprisonment from eight months to three maintaining the fine, I am not prepared to reduce the sentence further by reducing the fine. The petition is accordingly dismissed.

N.T.R. — *Petition dismissed.*

Cr. App. No. 287 of 1941

August 27, 1941

HORWILL, J.

P. RAMA NAIDU
v.
EMPEROR.*

Penal Code (XLV of 1860), Ss. 193 & 457—Attestor of receipt—Receipt forged—Conviction for forgery and fabrication of false evidence.

Appellant was an attestor of a receipt. There was litigation between P. W. 9 and A-9 and P. W. 9 had obtained a decree against A-9 for maintenance. The receipt purported to be a discharge of that decree debt. It was in evidence that the attestor knew of the suit that was brought and was sufficiently nearly related to the parties to be interested in bringing such a document into existence in the interests of the first and 9th accused in support of whom he had already deposed in the maintenance proceedings.

Held, *that the appellant was guilty of forgery and of fabricating a false document, that even though a receipt does not need attestors, the persons who brought the document into existence intended that it should be attested and that the accused should be one of the attestors, that the document was not therefore complete until the appellant had signed; therefore the appellant abetted the making of a false document and as he knew that the document was intended to prove the discharge of the decree debt he was also guilty under s. 193 of fabricating false evidence.*

Appeal against the order of the Court of Session of the Chittoor Division in C. C. No. 7 of 1941.

K.S. Jayarama Ayyar & V.V. Chowdary, for Accused.
Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT.

The appellant was admittedly an attestor to a forged document. There had been litigation between P. W. 9 and the 9th accused and P. W. 9 had obtained a decree against the 9th accused for maintenance. The forged document purported to be a discharge of that decree debt.

The appellant admits that he was an attestor, and the evidence shows that he knew of the litigation between the parties. The writer of the document turned approver and was examined as P. W. 3. He states that at the time when the document was forged, a blank space was left for the attestation of some other person and that when he saw the document again, that space was filled by the signature of the appellant. The appellant did not deny this but explained:

> "I was in my field in Nalagampalle. I did not see the payment of any money. I said "How can I sign when I have not witnessed the payment?" He (Lingama Naidu, the 1st accused) said "She has affixed her thumb impression. The witnesses have all signed. Can you not trust me?" I then believed him and signed."

This statement itself suggests that the appellant was somewhat suspicious of the document. It is clear from the evidence that he knew of the suit that had been brought and that he was sufficiently nearly related to the parties to be interested in bringing such a document into existence in the interests of the 1st and the 9th accused in support

*1941 M.W.N. 1036

of whom he had already deposed in the maintenance proceedings. On these facts I think that the learned Judge was satisfied in coming to the conclusion that the appellant was guilty of forgery and of fabricating a false document.

The judgment of Pandrang Row, J., in *Chinna Veera Reddy* v. *Emperor* (1), has been referred to as providing an instance where a learned Judge of this Court thought that the bare fact of an attestation was not sufficient to justify an inference that the attestor knew that he was attesting a forged document. The learned Judge had however other facts before him besides the mere fact of attestation, and he quoted the judgment of the trial Judge to show that it was improbable that the attestor had the knowledge imputed to him.

Mr. Jayarama Aiyar has also argued that as a receipt does not need attestors, the receipt was complete before the appellant signed it, and that he therefore could not be said to have abetted the making of a false document The fallacy of this argument is that although attestation was not necessary, the persons who brought this document into existence intended that it should be attested and that the appellant should be one of the attestors. The document was therefore not complete until the appellant had signed. He therefore abetted the making of a false document, and as he must have known that the document was intended to prove the discharge of the decree debt, he was also guilty under S. 193 of fabricating false evidence.

The conviction is right and the sentence extremely light. They are therefore affirmed and the appeal dismissed.

T. *Appeal dismissed.*

Cr. R. C. No. 393 of 1941

August 27, 1941

HORWILL, J.

Mrs. Raji Bai Ammal, guardian & mother of 1 Minor Dickson Chandrahasan & another

v.

Md. Nathar Sahib.*

Evidence Act (I of 1872), S. 112—Petition for maintenance under S. 488 Cr. P. C. of two illegitimate children against the putative father—Proof of access to husband—Petition must be dismissed.

S. 112, Evidence Act, is clear that all admissions of paternity are irrelevant if the complainant fails to prove that she and her husband had no access at the time when the child could have been begotten.

A petition for maintenance must necessarily be dismissed against a putative father where the petitioner may have had access to her husband.

Facts: A petition under s. 488 Cr. P. C. was put in by the petitioner as mother and guardian of two illegitimate children. Petitioner is a married woman. She was employed as a midwife. Respondent got acquainted with her and contracted illicit intimacy with her. A son and a daughter were the result. The claim for maintenance is for the two children.

Plaintiff alleged that she got separated from her husband in 1934 and became acquainted with the respondent from July, 1937. The first court found that the husband had also now and then been paying visits to the petitioner. The lower court observed:

"It is also clear from the evidence of the defence witnesses that P.W. 1 used to be intimate with ever so many males. Respondent who was apparently one of those must have been duped at the outset that he was the only lover intimate with her and subsequently when he learnt that she has been the 'M. D. D.' of many others he should have fallen out. Under the circumstances there is no conclusive proof that her children were born to respondent and so declined to pass an order under s. 488 Cr. P. C. for maintenance of the children."

A revision was filed in the High Court on the ground. "The lower court failed to consider the only vital fact that ought to be taken into consideration, viz, whether or not the respondent was exclusively keeping the petitioner-guardian at about the time the child was born in October 1938, and the lower court has adverted to irrelevant considerarions as to her moral character in 1939 and subsequently."

Petition under ss. 435 & 439 Cr. P. C. 1898, praying the High Court to revise the order of the court of the Sub Divisional Magistrate of Chidambaram dated 7—1—1941 and passed in M. C. No. 38 of 1940.

K. S. Jayarama Iyer & G. Gopalaswamy, for Petr.
C. Padmanabha Ayyangar, for Respt.
Public Prosecutor (V. L. Ethiraj), for Crown.

1. (1939) M.W.N. 514 : Cr. 86
*1941 M.W.N. 1037

ORDER

In view of the clear wording of s. 112 of the Evidence Act, all admissions of paternity are irrelevant if the complainant fails to prove that she and her husband had no access at the time when the child could have been begotten.

The magistrate has held that there may have been access. The petition for maintenance had necessarily therefore to be dismissed, however convincing the evidence adduced by the complainant might have been.

This petition is dismissed.

N.T.R. — *Petition dismissed.*

Cr. App. No. 357 of 1941

August 28, 1941.

BURN, J.

VENKATACHALAM CHETTY

v.

EMPEROR.*

Penal Code (XLV of 1860), Ss. 302 & 328—Dhatura poisoning—Victim dying of pneumonia—Offence

The *accused gave some food with which dhatura was mixed to a person and he was found next morning lying out in the open and was taken to the hospital. The medical evidence was that the victim recovered from dhatura poisoning but developed pneumonia and died.*

Held, *that the accused could not be convicted for the offence of murder as his act in administering dhatura had not been shown to have caused his death but that he was guilty under s. 328 I. P. C.*

Appeal against the order of the court of the session of Coimbatore division in C. C. No. 30 of 1941.

Public Prosecutor (V. L. Ethiraj), for Crown.

Accused not represented.

JUDGMENT.

The appellant was tried by the learned sessions judge of Coimbatore on a charge of murder (s. 302) and two charges of administering poison with intent to commit an offence. The facts found against him were that on the night of the 6th December last at Pollachi he gave some food with which dhatura was mixed to three Malayalees in order that he might rob them of whatever they had on their person. The three men were found next morning lying out in the open and they were taken to the hospital. The medical evidence showed that all of them had been given dhatura. Two of them recovered completely. The third developed pneumonia and died on the 13th December.

There is no reason to differ from the finding of the learned sessions judge with regard to these facts. The learned Public Prosecutor has taken me through the evidence of the important prosecution witnesses, P. Ws. 1 and 2. There are the two men who recovered from the dhatura poisoning P. W. 1 is the son of the deceased. This man identified the accused at parades held on different dates some time after the occurrence. The accused at the trial merely pleaded that he knew nothing and that the case was false. He was not able to say why any of the witnesses should have given false evidence against him.

The only point that needs discussion is whether the conviction of the accused for the offence of murder is correct. The conviction for the two offences under S. 328 of poisoning P. Ws. 1 and 2 is clearly correct and the sentences of seven years rigorous imprisonment passed upon the accused for those offences are not excessive. With regard to the person who died, the learned sessions judge has convicted him of murder, finding that he died of pneumonia consequent upon the exposure occasioned by coma or unconsciousness produced by the poison. The learned judge refers to a case reported in *Emperor* v. *Nanhu* (1). There is however one important difference between the Allahabad case and this. In the Allahabad case it was proved that the deceased died within a very short time of the dhatura poisoning and the learned judges held that the accused ought to have been charged under S. 302 I.P.C., and that his offenee clearly fell within the third and fourth paragraphs of S. 300. In the present case however death was not due to dhatura poisoning. The doctor's evidence is clear that the victim recovered from dhatura poisoning and that he died of pneumonia. The question therefore is whether pneumonia was a likely consequence of the administration of dhatura. If it was likely that the victim after being given dhauura and thereby being rendered unconscious would develop pneumonia, a disease which is very often fatal, then the pneumonia can be said to be so connected with dhatura poisoning that the act of the accused in administering dhatura had

* 1941 M.W.N. 1038

1. (1923) 45 All 557

caused the death of the victim. But there is no evidence that pneumonia was a probiable consequence of sleeping out at Pollachi on the night of the 6th December. The doctor does not say that any one who slept out in the open on that night was likely to get pneumonia: He says merely that the man "developed pneumonia on account probably of exposure in the open maidan on 6-12-1940." Thus it is not established that the pneumonia was in fact caused by the exposure. Moreover the doctor did not say that pneumonia was a probable consequence of sleeping out; and as a matter of fact it appears that the other two men who were poisoned, P. W. 1 and 2, although they also slept out in the open for the same length of time, did not develop pneumonia.

In these circumstances it is clear that the act of the accused in administering dhatura to Kunjan Nayar has not been shown to have caused his death The conviction of the appellant for the offence of murder cannot therefore be sustained and it is set aside. The appellant must be convicted in the case of Kunjan Nayar also of an offence under s. 328 I. P. C. I set aside the sentence of transportation for life, and for the offence under s. 328 I. P. C. I sentence the appellant to ten years rigorous imprisonment, the sentence to run concurrently with the other two sentences of seven years rigorous tmprisonment.

N.T.R.

Cr. R. C. No. 443 of 1940

Cr. R. P. No. 422 of 1940

September 20, 1940.

LAKSHMANA RAO, J.

SHROFF BODANNA

v.

EMPEROR*

Cr. P. C. (V of 1898), Ss. 51 & 523—Property seized by police under S. 51—Disposal cannot be postponed indefinitely—Must be dealt with under S. 523.

Disposal of property seized by the Police under S. 51, Cr. P. C. cannot be indefinitely postponed and the subordinate magistrate must deal with the application under S. 523 Cr. P. C.

*1941 M.W.N. 1039

The FACTS appear from the affidavit of the petitioner:

"I carry on the business of shroff and pawn broker in Main Bazaar, Kurnool for the past 40 years.

On the 17th of January 1940, the Sub Inspector of Kurnool Taluk came to me and took possession of a number of jewels which have been pledged with me by third parties and seized them on suspicion in spite of my protests, that I was the bona fide pledgee of the articles. My protests were not heeded and the properties seized were sent to the Stationary Sub Magistrate, Kurnool where they have since remained. One of the items seized has been purchased by me.

On the 22nd and 23rd February 1940 the police at Kurnool Town seized further 297 items of silver and 35 items of gold which were pledged with me by various third parties. In spite of my protests the said articles were seized by the police and sent to the Stationary sub Magistrate, Kurnool.

The said articles seized had at the time of their seizure chits tied to each of them in which particulars of the debt were noted. The various pledge transactions were also noted in the account book kept by me in the usual course of business.

Subsequent to their seizure, I applied to the stationary sub magistrate, Kurnool several times for the return of the articles stating that the properties seized were not stolen properties, that in any event I am a bona fide pledgee of the jewels and other items seized and that in any event I am entitled to the return of the properties and also offered to produce my accounts and adduce evidence that I am the bona fide pledgee of the properties.

The Police have not filed any charge sheet in spite of several months. The properties seized on 22nd and 23rd February were in connection with Crime No. 52 of 1939 of Kurnool Police Station and I understand and believe the same to be true that (neither) the informant of said crime nor anybody in British India has identified the properties seized. No charge sheet has been filed and my properties are simply detained in the magistrate's court. In the meantime I am put to serious loss and inconvenience and some of the pledgees have given notice to me demanding the return of the articles and I

am not able to claim any interest. The stationary sub magistrate would not pass any written order on my petitions in spite of requests or give me an opportunity to prove that I am a *bona fide* pledgee of the articles concerned and finally when he was pressed he passed an order dated 9th June 1940 simply putting off the matter and assigning no reasons.

* * *

As the matter has been long pending and as the magistrate simply declines to hold an enquiry under s. 523 Cr.P.C., and in the circumstances of the case set out above it is just and necessary that this Honourable Court be pleased to treat this matter as urgent and entertain the revision petition."

The order of the sub magistrate in R. C. A. 260 of 40 was as follow:

"This is to inform you that your properties will not be returned to you for sometime"

Petition under ss. 435 and 439, Cr. P. C., 1898 praying the High Court to revise the order of the court of the stationary sub magistrate, Kurnool dated 7—6—1940 and made in R.C.A. No. 260 of 1940.

V. Rajagopalachari, for Petr.

Pnblic Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The disposal of property seized by the police under s. 51 Cr. P. C. cannot be indefinitely postponed and the stationary sub magistrate of Kurnool is directed to deal with the application of the petitioner under s. 523, Cr. P. C. in accordance with law.

N.T.R.

——

Cr. R. C. Nos. 183, 184 & 185 of 1940

Cr. R. P. Nos. 175, 176 & 177 of 1940

September 20, 1940

LAKSHMANA RAO, J.

SANKU VENKATACHALLAM & others

v.

EMPEROR*

Salt Act (Mad. Act IV *of* 1889), *s.* 74 (*d*)—*Transport of contraband salt—Conviction of owner and driver of vehicle.*

Where the petitioners were the owner, driver and cleaner respectively of a motor lorry in which contraband salt was transported and the evidence did not show that they knew or had reason to believe that the salt was contraband,

Held, *they could not be convicted under S. 74 (d), Madras Salt Act.*

FACTS: Seven accused were charged under s. 74 (d), Salt Act with being in posession of swamp salt. A 3 and 4 were living in Olavur who admitted that they collected swamp salt and arranged for transport in a lorry to Madras for sale. A 1 was the person with whom they arranged for the transport and sale. A 5 was the owner of the lorry in which the bags were transported A 6 was the driver and A 7 the cleaner of the lorry. A 2 was the owner of the compound in which the bags were unloaded from the lorry and from where the police seized them. All the accused were convicted for the offence.

A 5, 6 and 7 preferred the revision against their conviction on the grounds *iuter alia.*

"The lower court erred in holding that the petitioner was guilty of an offence under s. 74 (d), Madras Salt Act IV of 1889. Assuming that he lent his lorry for hire for the transhipment of the salt in question he cannot be guilty of the offence unless he knew or had reason to believe that the salt was contraband. Not having found that the petitioner had such knowledge the lower court erred in convicting him of the offence."

Petition under Ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the judgment of the Special Honorary Presidency Magistrate of the court of Presidency Magistrates, George Town, Madras dated 13—2—40 and passed in C. C. Nos. 2374, 2375 and 2376 of 1939.

A. Bhujanga Rao, for Petrs.

C. D Venkataramanan, for Crown.

ORDER

The petitioners are the owner, driver and cleaner of the motor lorry in which the contraband salt was transported and the evidence does not show that they knew or had reason to believe that the salt was contraband. The conviction of the petitioners under S. 74 (d) of the Madras Salt Act IV of 1889 is therefore set aside and the fines if levied will be refunded.

N. T. R. *Conviction set aside.*

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*1941 M.W.N. 1940

Cr. R. C. No. 741 of 1941.
Cr. R. P. No. 696 of 1941
October 15, 1941
HORWILL, J.

D. K. REDDY v. EMPEROR.*

Cr. P. C. (V of 1898), Ss. 407, 480 & 486—Sentence under S. 480—Appeal.

An appeal lies against a sentence imposed under S. 480 under S. 486 (1) to the district magistrate. The district magistrate has no right to direct such an appeal to be heard by a magistrate of the first class subordinate to him. S. 407 (1) does not apply to an appeal under S. 486 (1).

Petition under Ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the judgment of the court of the sub divisional magistrate, Bellary dated 7—8—1941 and passed in C.A. No. 16 o f 1941 preferred against the judgment of the court of the stationary sub magistrate of Rayadrug in M. C. No. 1 of 1941.

K. S. Jayarama Ayyar & C. K. Venkatanarasimham, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The petitioner was alleged to have committed contempt of court; and the sub magistrate who was presiding over that court took summary action under S. 480 Cr.P.C. and sentenced the petitioner to a fine of Rs. 15. He preferred an appeal under S. 486 Cr.P.C. In the first instance, he preferred it to the sub divisional magistrate. On an objection taken by the prosecuting sub inspector, the sub divisional magistrate held that he had no jurisdiction to hear the appeal. The petitioner then approached the district magistrate, who held that the sub divisional magistrate had power. When the matter came back to the sub divisional magistrate the prosecuting sub inspector again raised the objection, but the sub divisional magistrate felt that his hands had been tied by the district magistrate and so overruled the objection. The prosecuting sub inspector then went again to the district magistrate, who passed an order which is not on the record, but which presumably was to the effect that the subdivisional magistrate had power to hear the appeal. The short point that arises here is whether the sub divisional magistrate had jurisdiction or no.

An appeal lies against a sentence imposed under S. 480 only under S. 486 (1); for S. 407, which is the general section granting a right of appeal from 2nd class magistrates, applies only to persons convicted on *a trial* held by a magistrate. As the petitioner was not convicted on a trial, he would have had no right of appeal at all were it not for S. 486 (1). The appeal against the sentence under S. 480 lies—in the words of S. 486 (1)—"to the court to which decrees or orders made in such court are ordinarily appealable." S. 407 (1) makes an appeal ordinarily lie to the district magistrate; for he has to hear all appeals from 2nd or 3rd class magistrates if they are not transferred under S. 407 (2): vide *Eroma Variar* v. *Emperor* (1), which was followed by Jackson, J. in *Sivaswami Palankondan* v. *Perumal Palaiyondan* (2).

The remaining question that has to be considered is whether the district magistrate has a right to direct such an appeal to be heard by any magistrate of the first class subordinate to him. It is argued by the learned Public Prosecutor that S. 486 (2) gives such a power; for that sub-section says:

"The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section............"

Most of the provisions of Chapter XXXI could properly be applied to appeals under S. 486; but this particular sub-section (2) of S. 407 says that:

"The district magistrate may direct that any appeal *under this section*.........shall be heard by any magistrate of the first class subordinate to him......"

so that the district magistrate has power to direct the transfer from his file to that of the first class magistrate only appeals under S. 407 (1), i.e. appeals from convictions on a trial. That sub-section could not therefore be properly applied to an appeal under S. 486 (1).

The sub-divisional magistrate having acted without jurisdiction, this petition is allowed and the district magistrate ordered to take the appeal on his file and to dispose of it according to law.

N.T.R. —— *Petition allowed.*

*1941 M.W.N. 1073 (i)

1. (1903) 26 Mad. 656 F.B.
2. (1931) M.W.N. 1194; Cr. 262

Cr. R. C. No. 192 of 1940
Cr. R. P. No. 184 of 1940
September 26, 1940
LAKSHMANA RAO, J

Commissioner, DINDIGAL MUNICIPALITY
v.
V. RAJAMANI IYER*

District Municipalities Act (Mad. Act V of 1920), Ss. 249 & 313—Refusal to renew license—Prosecution for running hotel

*1941 M.W.N. 1073 (2)

without license—Validity of order of refusal—If can be gone into.

Where the executive authority of a Municipality declined to renew license to the accused for running a coffee hotel but still he ran the business and was prosecuted under Ss. 249 *and* 313 *of the District Municipalities Act.*

Held, *the accused could not be acquitted by the criminal court on the ground that the order of refusal of the license was not valid.*

FACTS appear from the following extracts from the order of the lower court:

"In this case the Commissioner, Dindigal Municipality, has laid a complaint against Sri V. Rajamani Ayyar under Ss. 249 and 313 of the Madras District Municipalities Act, 1920 for running a coffee hotel and preparing and selling sweet-meats in unlicensed premises in East Car St., Dindigal, his application for renewal of license for 1939—40 having been rejected.

The accused denied the offence. Three witnesses have been examined for the prosecution. Their evidence is briefly this: P.W. 2 is the sub-inspector of the division. He says that the accused sent the application Ex. D to the commissioner on 1—3—1939 for the renewal of the license for his premises for 1939—40 and it was referred to him through the health officer. He inspected the premises on 8—3—1939 and found the following defects:

(1) the walls of the building were dirty and had not been whitewashed;

(2) there was no waste bin;

(3) there was no sterilizer of the design in vogue in other hotels; and

(4) there was no visitors book."

"Since there is reason to believe that the executive authority had not applied his mind to the application Ex. D and considered it and had not also inspected the accused's premises as he was bound to, to satisfy himself that they were really dirty so as to warrant the refusal to renew the license, it would appear that the order Ex. D-2 has to be treated as invalid, the court being entitled in the circumstances to go into the question of the validity or otherwise of order in the light of the decisions in 39 L.W. 29 and 51 Mad. 876, while the order Ex. G 2 itself obtained as it was on a misleading statement was passed only on 1st June 1939. We have to take it that no valid order had been passed on accused's application within 30 days from the date of its receipt and hence under S. 321 (11) the application should be deemed to have been allowed for the year subject to the conditions ordinarily imposed as contended by the defence. The register of applications reeived in the municipal office was summoned and on looking into it P.W. 2 said that application No. 993 was the one sent by the accused on 1-3-1939. In Column 15 of the register against this application in which the nature of disposal has to be marked, the entry for prosecution has been made (Ex. VI). It is contended that this cannot be taken as a final order on the accused's application. If really the accused had infringed the conditions of his licence by giving room to any defects as P. W. 2 would have us believe, he could have been prosecuted then and there without taking them as a ground for the refusal to renew the license for the coming year. We find the accused not guilty and acquit him under S. 245 (1) Cr.P.C.

The municipality filed the revision petition against this order.

Petition under Ss. 435 & 439, Cr. P.C., 1898, praying the High Court to revise the judgment of the court of the Bench of Magistrates, Dindigal in S. T. No. 1639.

V. Seshadri, K. Rajah Iyer & K. S. Rajagopalachari, for Petr.

V.T. Rangasami Ayyangar & A. S. Srinivasa Iyer, for Respt.

Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER

The executive authority declined to renew the licence and the acquittal of the accused on the ground that the order of refusal is not valid is unsustainable. The order of acquittal is therefore set aside and there will be a retrial in accordance with law by the district magistrate or such other magistrate as he may direct.

N.T.R.

Cr. R. C. No. 673 of 1940.
Cr. R. P. No. 633 of 1940.
November 21, 1940.

LAKSHMANA RAO, J.

PICHUMNI AYYAR
v.
EMPEROR

District Municipalities Act (Mad. Act V of 1929) Ss. 248 & 313—Petitioner charged with running a hotel without license—Plea that he had deposited the license fee and applied for reneval—No admission of guilt.

*1941 M.W.N. 1074

To a charge under Ss. 249 *and* 313 *District Municipalities Act the petitioner admitted he could produce no license but contended that he had records to show that he had deposited the license fee and applied for renewal and contested the case.*

Held, *the plea was misunderstood and is not one that amounts to an admission of guilt.*

FACTS: In this case the petitioner was charged before the first class Bench court Madura for running a hotel without a licence under Ss. 249 and 313 District Municipalities Act. On the date of hearing the petitioner appeared before the Bench court but the vakil that he engaged could not appear. Petitioner stated that he was contesting the case. The Vice President of the Bench court asked the petitioner whether he had obtained the licence or not. The petitioner answered "I said that I have deposited the licence fee, made the application for renewal. So I must be deemed to have a licence under the Act and I cannot be charged with carrying on the business without a license". The Magistrate did not pay heed and took the view that there can be no defence at all for a prosecution of this kind if no licence is produced by the accused and hence convicted the accused. The magistrate thought that because the petitioner admitted that he had no license he admitted his guilt. The Bench Magistrates then held "Admits that he is running a hotel without a license" found him guilty under that section and sentenced him to pay a fine of Rs. 3 in default 2 days simple imprisonment.

Petition under Ss. 435 & 439, Cr. P. C. 1899, praying the High Court to revise the judgment of the court of the First Class Bench of Magistrates of Madura Town dated 28—6—1940 and passed in C. C. No. 10683 of 1940.

N. S. Srinivasan, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The plea of the petitioner was misunderstood and the conviction cannot be sustained. It is therefore set aside and there will be a retrial in accordance with law. The fine if levied will be refunded.

T. *Conviction set aside.*

Cr. R. C. No. 211 of 1940
Cr. R. P. No. 203 of 1940
September 20, 1940
LAKSHMANA RAO, J.
RAMACHANDRAN
v.
EMPEROR*

Motor Vehicles Act (*VIII of* 1914) *s.* 16 *& r.* 138*—Contract to carry passenger for reward—User of car—Permit.*

Where the car of the petitioner was used for carrying passengers for reward under a contract for the use of the vehicle for an agreed sum and possession of the car was not transferred within the meaning of the explanation to r. 4(3) *of the Madras Motor Vehicles Rules.*

Held, *the car would be a "contract carriage" as defined in r.* 4, *cl.* 3 *and the petitioner having no permit to use it as a contract carriage would be guilty under S.* 16, *Motor Vehicles Act.*

FACTS: Accused was charged with a breach of r. 138 Motor Vehicles Rules punishable under S. 16 Motor Vehicles Act in that he on 9—10—39 permitted his motor car to be used as a contract carriage without a permit in Form G or G-1 to use the same as a contract carriage.

The evidence of P.W. 1 was that accused allowed her to use his car on her paying Rs. 50 monthly towards expenses, that the vehicle was not intended for public use, that she shared the cost of maintenance with the accused in running the car, that the car had not been let out for hire to anybody else. On this evidence the magistrate convicted the accused.

The revision was against that order.

Petition under Ss. 435 & 439, Cr.P.C., 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the court of the Presidency Magistrates, Egmore, Madras dated 11—12—1930 and made in M. V. No. 551 of 1939.

M. Ranganatha Sastri & M. V. Ganapathi, for Petr.

Crown Prosecutor, for Crown.

ORDER

The car of the petitioner was used for carrying passengers for reward under a contract for the use of the vehicle for an agreed sum, and possession of the car was not transferred within the meaning of the Explanation to R. 4, cl. (iii) of the Madras Motor Vehicle Rule 1938. The car would therefore be a 'contract carriage' as defined in R. 4, Cl. (iii) and the petitioner had no permit to use it as a contract carriage. The conviction is therefore correct but the

* 1941 M.W.N. 1075

fine is excessive and it is reduced to Rs. 20: otherwise this petition is dismissed.

N.T.R. *Conviction confirmed.*

Cr. R. C. No. 163 of 1941
Cr. R. P. No. 156 of 1941
September 2, 1941
SIR LIONEL LEACH, C.J.
& CHANDRASEKHARA AYYAR, J.

NALLAPPA GOUNDAN
v.
CHINNAMMAL*

Cr. P. C. (V of 1898*), S.* 195 (1) *(b)—Statement by witness—Prosecution for defamation—Complaint by court not necessary.*

Complaint of court under S. 195 (1) *(b) Cr.P.C. is not necessary to prosecute a person for defamation under S.* 500 *I.P.C. in respect of a statement made by him in the witness box.*

(1939) *M.W.N.* 192 (1): *Cr.* 24 overruled.

Petition under Ss. 435 & 439 Cr. P. C. 1898 praying the High Court to revise the judgment of the court of session of the Trichinopoly Division dated 18—9—1940 and passed in C. A. No. 66 of 1940 preferred against the judgment of the court of the joint magistrate of Karur, in C. C. No. 64 of 1940.

G. Gopalaswamy, for Petr.
Complainant not represented.
Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

(SIR LIONEL LEAACH, C.J.)

The petitioner was convicted by the joint magistrate of Karur under S. 500, I.P.C. for the defamation of his wife. He was ordered to pay a fine of Rs. 100 and in default of payment to undergo simple imprisonment for three months. The defamatory words had been uttered by the petitioner when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. In the course of his evidence in support of the complaint he accused his wife of unchastity. They had quarrelled and she was living separately, but in the same building. The conviction of the petitioner was confirmed by the sessions judge of Trichinopoly on appeal. The petitioner now asks this Court to set aside the conviction on the ground that a complaint of defamation which is based on a statement in court can only be filed by the court in which the statement was made. There are conflicting decisions of the court on the question. In three cases Lakshmana Rao, J., has expressed the opinion that the complaint must be filed by the court while Burn, J., has expressed an opinion to the contrary.

* 1940 M.W.N. 1076

The first of the decisions by Lakshmana Rao, J., was given in *Shanmughasundaram Pillai* v. *Manicka Mudaliar* (1). In that case the petitioner charged the son-in-law of the respondent with theft of certain documents and records and in an affidavit filed in support of an application for a search warrant stated that some of the articles had been secreted in the house of the respondent. A search warrant was issued and in accordance with this authority the respondent's house was searched. Nothing was, however, found there and the son-in-law was ultimately discharged. The learned judge considered that as the complaint of defamation was founded on false evidence the offence would fall within S. 193 of the Penal Code and was only cognizable on a complaint by the court. In support of his order Lakshmana Rao, J. relied on the decision of this Court in *Appadurai Nainar, In re* (2), to which reference will be made presently. The learned judge expressed a similar opinion in *Ganapati Asari* v. *Kuppuswami Asari* (3), and in *Ramaswami Konar* v. *Nachiar Ammal* (4).

The opinion of Burn, J. was stated in *Venkataramanjulu Chetti* v. *Kanniah Chetti* (3) and is to be gathered from the following excerpt from his judgment:

"The mere fact that the defamation is committed in, or in relation to, criminal proceedings in a court is not a reason for requiring the sanction of that court or for requiring that court to prefer a complaint . . . . . The petitioner in this case has complained of the acts which have, according to him, caused harm to his reputation he has no concern with the same acts in so far as they may have constituted an offence against public justice."

The provisions of S. 195, Cr.P.C. do not apply to defamation. This Court has held in *Thiruvengada Mudali* v. *Tirupurasundari Ammal* (6), thet a person who is defamed by a witness when in the witness box, is at liberty to file a complaint against his defamer under the provisions of the I.P.C. When such a right exists it can only be taken away by an express statutory provision to that effect. There is nothing in S. 195 Cr. P. C., of in any other part of that Code, or in any other enactment which takes away this right.

We consider that an examination of the judgment in *Appadurai Nainar, In re* (2), does

1. (1939) M.W.N. 192 (1) : Cr. 24
2. (1935) M.W.N. 946 (2) Cr. 162 (2);59 Mad. 165
3. (1939) M.W.N. 320: Cr. 44
4. (1940) M.W.N. 867: Cr. 107
5. (1933) M.W.N. 1263: Cr. 195
6. (1926) M.W.N. 606: 49 Mad. 728 F.B.

not render real support for the opinion that when a person is defamed in evidence given in support of an offence which falls within the purview of S. 195, Cr. P. C., the court in which the defamation takes place must lay the complaint charging the witness with defamation. In *Appadurai Nainar, In re* (1) the facts were these. A civil court had held that a promissory note had been fabricated and had dismissed the suit. Thereupon the defendant without asking the aid of the civil court, filed a complaint charging the maker, the writer and the attestors of the instrument with forgery, an offence falling in the circumstances within the mischief of S. 195 Cr.P.C. On a preliminary objection being taken to the effect that the maker of the instrument could not, in view of the provisions of S, 196 (1) (c), Cr.P.C, be charged except on the complaint of the court, the complaint so far as the maker was concerned was dismissed, but the magistrate proceeded with the charge against the attesting witnesses. Madhavan Nair and Burn, JJ., held this to be wrong and stated that parties should not be allowed to evade the provisions of S. 195 (1) (b), Cr.P.C. by filing a complaint under another provision of the Penal Code if an offence under S. 193 of the Code or of any other of its sections mentioned in S. 195 (1) (b), Cr. P. C., had been committed. In that case the complaint was based on a forged instrument which had been given in evidence, and we do not read the judgment as placing in the same category a charge of defamation which is an entirely personal matter. That question was not under consideration.

We consider that the opinion expressed by Burn, J., in *Venkataramanjulu Chetti* v. *Kanniah Chetti* (2), is preferable and it is to be remembered that Burn, J., was a member of the Bench which decided *Appadurai Nainar In re* (2). It is also in point to mention that the opinion of Burn. J., in *Venkataramanjulu Chetti* v. *Kanniah Chetti* (3) accords with a much earlier decision of this Court and one given by a Bench. [See *Krishna Rao* v. *Appasami Ayyar* (7).] There a magistrate had held that the sanction of the court was required to a proceeding for defamation in respect of a statement made in court and as sanction had not been accorded dismissed the complaint filed by the person alleged to have been defamed. The complainant applied to this Court to correct the order in revision and this was done. In fact no attempt was made to support the magistrate's order which was described by this court as being untenable.

It may be mentioned that opinions which have been expressed by other High Courts support the opinion of Burn J. See *Satish Chandra Chakravarthi* v. *Ram Dayal De* (8), *Mohamad Isa* v. *Nazim Hussain* (9), *Mst. Binia* v. *Crown* (10) and *Chotalal* v. *Phulchand* (11)

The petition will be dismissed.

N.TR. *Petition dismissed.*

7. (1895) 1 weir 58

8. (1921) 48 Cal. 388
9. (1940) I.L.R. All 314
10. (1937) I.L.R. Nag. 338
11. (1937) I.L.R. Nag. 425

Cr. R. C. No. 675 of 1941
Cr. R. P. No. 635 of 1941

August 8, 1941

HORWILL, J.

PALAYAN
v.
EMPEROR.*

Cr. P. C. (V. *of* 1898), *S.* 350 (1), *proviso—Demand for recall and examination—Right to limit to some witnesses.*

Petitioner invoked provio (a) to S. 350 *Cr. P.C. and after examining certain P. Ws. asked the magistrate not to examine the remaining witnesses. But the magistrate decided that all the witnesses should be examined.*

Held, (1) *that even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined;*

20 *L.W.* 916 followed.

(2) *but that it was open to the magistrate to examine the other witnesses, if he felt the need to examine them.*

Petition under Ss. 435 and 439, Cr. P C., 1898, praying the High Court to revise the order of the Chief Presidency Magistrate, Egmore, Madras dated 29—7—1941 and passed in C.C. No. 926 of 1941.

Pais, Lobo & Alwares, for Petr.

K. V. Ramaseshan, for Crown.

ORDER

The petitioner was an accused in C. C. No. 926 of 1941 on the file of the Chief Presidency Magistrate, Egmore. Upon a transfer of the magistrate, the peti-

*1941 M.W.N. 1077

tioner invoked the provisions of proviso (a) to S. 350, Cr. P. C. and asked the magistrate to recall the prosecution witnesses for fresh examination. The learned counsel for the petitioner found, after cross examining certain prosecution witnesses, that they were saying more than they had before, and he thought it was not in the interests of his client to examine any more prosecution witness. Hy therefore asked the magistrate not to examine the remaining witnesses. The Magistrate insisted and said :

"It is not open to the accused to say after some of the witnesses were examined, that the other witnesses need not be examined. Even if he does not want the other witnesses to be examined the court can in the interests of proper appreciation of evidence and in the interests of justice examine all the witnesses again. I therefore decide that all the witnesses will be summoned and heard again."

It is argued on behalf of the petitioner that both the reasons given by the learned magistrate are not valid.

Two decisions of this Court (*In Re Vudigalapudi Gadu* (1) and *Veerappa* v. *Emperor* (2), make it clear that even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined.

The other question is whether, after the accused has said that he does not wish to examine all the witnesses, it is open to the magistrate to examine them. The argument of the learned counsel for the petitioner is that once proviso (a) to S. 350 (1) Cr. P.C. has been invoked the magistrate has lost his power to summon witnesses under S. 350 (1). I should be reluctant to hold so unless the wording of S. 350 Cr. P.C. itself made that clear. Although a magistrate might be content to decide the whole of the case on the record, yet there are obvious disadvantages in deciding the case partly on the record and partly on the witnesses heard by him; and a magistrate might well be desirous, for a proper appreciation of the case by himself to hear all the witnesses again if he is obliged to examine some of them. I do not find anything in S. 350 Cr P.C. which prohibits him from exercising his discretion of examinining all the witnesses again merely because the accused has exercised his right under proviso (a) to S. 350. The judgment of Burn, J. in *Veerappa* v. *Emperor* (2), has been quoted in support of this contention; but I do not think that Burn, J, was of that opinion. The purport of his judgment is that the accused has a right to say that no more witnesses should be examined; but that his right to stop a further examination of witnesses is subject to a limitation, that limitation being the privilege of the magistrate under S. 350 (1) Cr.P.C. to examine all. In the particular case before him there was nothing on the record to show whether the magistrate had invoked his privileges under S. 350 (1) or not and so the learned judge dismissed the revision case on the ground that it was not "certain that the learned magistrate committed any error when he reheard two prosecution witnesses whom the accused did not want him to rehear."

The petition is therefore dismissed. I would like to add that the magistrate before examining the other witnesses in the case against the wishes of the accused should consider whether he himself feels the need to examine them. Only if he does, should he re-summon and rehear them.

N.T.R. — *Petition dismissed*

1. (1924) 20 L.W. 916
2. (1935) M.W.N. 179 : Cr. 35

Cr. R. C. No. 373 of 1941

Cr. R. P. No. 354 of 1941

July 30, 1941

HORWILL, J.

EMPEROR

v.

JAGGOPAL PRASAD & others

Madras City Police Act (III *of* 1889), *S.* 42, *sub-cl.* (1)—*Money found on the person of the accused—Betting on horses—Whether liable to forfeiture.*

The 1st *accused was found guilty of running a gaming house and the others of gaming within the house. The gaming of which they were guilty was betting on horse races. The police seized money that was in the pockets of the accused. The magistrate declined to forfeit the money that was on their person.**

Held, *that the general principle to be adopted by a magistrate in considering questions of this kind is whether the money is likely to have been used in connection with gaming. If so, he should order its forfeiture. If not, he should refrain from doing so.*

Where money found on the persons of the accused roughly corresponded with the value of the betting slips it is more than a concidence and such money must be money

* 1941 M.W.N. 1078

used by them for gaming. It is a question of fact in each case.

The rule of thumb that it is usual to confiscata all money found on the floor at the place of gambling and the money found on the persons of gamblers are returned to them may do well in the average case where there is no evidence one way or the other.

FACTS: The relevant portion of the judgment of the lower court ran as follows;

" . . . The final question is with regard to moneys found on the persons of the accused. Are they liable for forfeiture?

S. 42, sub-cl. (1), Madras City Police Act, empowers seizure of all moneys and securities for moneys and articles of value 'reasonably suspected to have been used or intended to be used for the purpose of gaming' which are found in a "common gaming house" raided under that section. S. 47 authorises destruction of all instruments of gaming found in a common gaming house on conviction of the person for keeping such a gaming house, or the persons present therein for the purpose of gaming. It also empowers the trying Magistrate to order all or any of the other articles seized or the proceeds thereof to be forfeited. It does not make mention of moneys.

The former section alone deals specifically with forfeiture of money or what can be treated as money or what could be converted into money found in a "common gaming house." It does not speak of money or its equivalent found on the persons present in the "common gaming house." Practice has been to confiscate all money found on the floor at the place of gambling and the money found on the persons of gamblers being returned to them. That being so in cases of gambling of all kinds except gaming on horse races should the money found on the persons of those charged with the offence of betting on horse races to be treated differently and be made the subject of forfeiture on their conviction?

It was argued for the prosecution that a distinction must be made between money pertaining to illegal betting on horse races and that used in other kinds of gambling. Further the word "therein" used in S. 42 (1) does not necessarily exclude money found on the person of those present in a "common gaming house" for the purpose of gaming on horse races since in the nature of things, money pertaining to betting on horse races is not generally found on floors. But the person keeps it with himself. It was also argued that the money seized from the three accused nearly equals the total amount of the bets shown on the betting slips recovered from them and as such should be treated as money "reasonably suspected to have been used or intended to be used for the purpose of gaming" within the meaning of S. 42 (1).

These arguments do not seem to be sound in principle. One can conceive of cases where there can be no relation between the sum found on a person and the amount mentioned in the betting slips he has.

There is no warranty in law to treat money found on the persons present in a "common gaming house" on the same footing as money found "therein". On the other hand, courts have drawn a distinction between the two kinds of moneys.

In 41 Mad 644 it was held that, on a conviction for gambling under Ss. 6 and 7 of the Madras Towns Nuisance Act (Act III of 1889) an order to confiscate money found with the gamblers can only be in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler.

1935 Cr. C. 858 already referred to is a case of gaming on horse races. Therein, the Calcutta High Court held on the question of forfeiture—S. 48 of the Calcutta Police Act (containing provisions similar to those of S. 42 (1) of the Madras City Police Act) provides for the forfeiture of all the money seized therein (i e. in the "common gaming house") but does not in terms at any rate, provide for the forfeiture of moneys found upon the persons arrested in a common gaming house. In this case 1918 All 390—*Maturwa* v. *Emperor* was referred to with approval. Again in 1931 M.W.N. 1310:Cr. 270—*Uppala Patti Bulli Nagayya* v. *Emperor* it was laid down that where confiscation of money was ordered there must be proof that it was used for gambling. The case of *Subbier* v. *Emperor* reported in 1935 M.W.N. 249 Cr. 41 lays down the same principle.

It will be thus seen that there must be some evidence to show that the money

seized was actually used or intended to be used for the purpose of gaming. A mere conjecture will not do. Whether the accused had managed to get the money found with them for purposes of paying the fines that might be imposed on them in a case posted for trial on the day of the raid as alleged by them or not, is beside the point. On the other hand, there is absolutely no proof that the money was the result of receiving bets on horse races to become liable for forfeiture.

In the light of the decisions quoted above and other similar decisions and in the circumstances of this case I hold that moneys found on the persons of the accused are not liable for forfeiture.

Petition under Ss. 435 & 439,, Cr. P. C., 1898 praying the High Court to revise the judgment of the special Honorary Presidency Magistrate, Egmore of the court of Presidency Magistrates Egmore, Madras dated 4—2—1941 and passed in C. C. No. 2040 of 1940 regarding the disposal of the money seized in the case.

Crown Prosecutor (P. Govinda Menon) for Crown.

A. S. Veeraraghavan, for accused.

ORDER

The first respondent has been found guilty of running a gaming house and the other respondents of gaming within the house.

The only question that arises in this petition is whether the money found in the pockets of the three respondents should be confiscated. Under S. 47 of the City Police Act the magistrate may order all or any of the articles seized or the proceeds thereof to be forfeited. Various articles were found about the premises, and the Police also seized the money that was in the pockets of the three respondents. The Magistrate has declined to forfeit the money that was on their person; and the question that arises in this revision petition—which has been filed by the Crown—is whether the Magistrate's order was a right one.

There can be no doubt that the general principle to be adopted by a Magistrate in considering a question of this kind is whether the money is likely to have been used in connection with the gaming. If so, he should order its forfeiture. If not, he should refrain from doing so. The Magistrate has not really considered this question at all, but has said that he intends following the practice of this Court to declare forfeited such money as may be found on the floor, and no more. The gaming of which the respondents were guilty was betting on horse races. When bets are made, money is taken and betting slips written in duplicate, one kept by the owner and one by the client. The point on which the Crown rely is that the sum of money found on the persons of the accused roughly corresponds with the value of the betting slips. It is not to be excepted, the learned Crown Prosecutor says, that money should be lying about on the floor. One would expect, when a bet is made, that the person conducting the betting would put the money in his pocket—not elsewhere. From the first respondent was recovered a sum of Rs. 443-11-0. The value of the betting slips on his person amounted to Rs. 188. In a tin box belonging to him were found betting slips amounting to Rs. 272 Thus the total value of betting slips found in his possession was Rs. 460-14-0, a little over Rs. 17 more than the value of the money found in his pockets. On the person of the second accused was cash to the value of Rs. 19-4-0 and betting slips of the value of Rs. 24 8-0. On the person of the third accused cash was found to the value of Rs. 35-8-[illegible] and betting slips of the value of Rs. 52-6-[illegible] It is a question of fact in each case whether money found on the person of a person convicted under this Act was used for gaming. The close similarity between the sums found and the sums noted on the betting slips seems to be more than a coincidence, and I have little doubt in my mind that the money found on the persons of the three accused was money used by them for gaming. The learned Magistrate's *rule of thumb* may do well enough in the average case, where there is no evidence one way or the other to indicate whether the money found on the person has been used for gaming or not; but where there is evidence pointing one way or the other, the magistrate is bound to take that evidence into consideration and not to rely entirely on his rough rule of practice.

The petition is therefore allowed and the money seized by the police ordered to be forfeited.

T. *Petition allowed.*

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